# *United States Court of Appeals for the Second Circuit*

# APPENDIX

ORIGINAL

# 77-6119

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P/S

## United States Court of Appeals

### For the Second Circuit

**Docket No. 77-6119**

BERALDINE L. ACHA and ARLENE M. EGAN, each individually and on behalf of all others similarly situated,

*Plaintiffs-Appellants,*

*against*

ABRAHAM D. BEAME, individually and in his capacity as Mayor of the City of New York, MICHAEL J. CODD, individually and in his capacity as Police Commissioner of the New York City Police Department, and THE CITY OF NEW YORK, as a public employer,

*Defendants-Appellees.*

SEP 14 1977

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## JOINT APPENDIX

### Volume II—Pages 304A to 610A

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PAGINATION AS IN ORIGINAL COPY

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[illegible]

7/16/76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BERALDINE L. ACHA, et al.,

Plaintiffs,

-against-

ABRAHAM D. BEAME, et al.,

Defendants.

OPINION AND ORDER
75 Civ. 3128

APPEARANCES:

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Of Counsel

HONORABLE W. BERNARD RICHLAND
Corporation Counsel of the City of New York
Attorney for Defendants
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Gregory D. Frost, Esq.
Of Counsel

---

KEVIN THOMAS DUFFY, D.J.

This is an action by two former members of the New York City Police Department who are seeking reinstatement with back pay. They are both female. Briefly, on June 30, 1975 Beraldine L. Acha and Arlene M. Egan, together with 369 other female police officers, were laid off by the Police Department due to budget cuts. In an opinion and order dated July 1, 1975, I denied plaintiffs' request for a preliminary injunction and dismissed the complaint on the ground that a facially neutral seniority system was immune from attack by reason of 42 U.S.C. § 2000e-2(j), and the recent holdings of two other circuits, 401 F.Supp. 816, 817. The Court of Appeals reversed my determination and ordered the complaint reinstated. Docket No. 75-7388, February 19, 1976. The Court held that:

> "If a female police officer can show that, except for her sex, she would have been hired early enough to accumulate sufficient seniority to withstand current layoffs, then her layoff violates section 703(a)(1) of Title VII, 42 U.S.C.§2000e-2(a)(1), since it is based on sexual discrimination."

By motions returnable June 23, 1976, plaintiffs have sought class certification, a preliminary injunction, summary judgment and interim counsel fees. Almost three weeks after the return date of these motions, and despite my denial of defendants' request for an extension of time, the defendants answered and cross moved for summary judgment.

On July 7, 1976 defendants advised this Court that the Police Department intends to rehire 60 police officers as of July 19 from the City's current preferred hiring list. Only one of these 60 is female. Yesterday, July 15, I held a hearing on these issues. This opinion constitutes my findings of fact and conclusions of law.

Plaintiffs have requested certification of a class consisting of female police officers whose employment with the New York City Police Department was terminated on or after June 30, 1975 soley for budgetary reasons. I find that this group of approximately 400 women is sufficiently numerous to make joinder of all impracticable; that there are questions of law and fact concerning the layoffs which are common to the group; that the individual plaintiffs' claims are typical; and, lastly, that they and their counsel will fairly represent the interests of the entire class. Rule 23(a), Fed. R. Civ. P. Furthermore, the City, in its past practice of limiting the appointment of women and in laying off police officers according to a seniority system held to be discriminatory, has acted on grounds generally applicable to the class; thus any relief ultimately granted will apply to the class as a whole. Rule 23(b)(2). It further appears that common questions of law and fact concerning the hiring practices of the Police Department predominate over those questions affecting individual members of the class and that a class suit is the fairest and most efficient manner of adjudicating this controversy. Rule 23(b)(3). Accordingly, the class will be certified.

Turning to the merits, the City contends that it is entitled to summary judgment dismissing the complaint on the ground that the action commenced shortly before the June 30, 1975 layoffs is barred by the statute of limitations and laches. The claim is that the discriminatory act, if any, took place in May of 1970, and is, therefore, untimely under the 300 day statute of limitation of Title VII, 42 U.S.C. § 2000e-5(e), and the three year statute of limitation applicable to actions under 42 U.S.C. § 1983. (See Kaiser v. Cahn, 510 F.2d 282, 284 (2d Cir. 1974) holding that N.Y. CPLR § 214(2) applies to Section 1983 actions).

Quite recently, the Court of Appeals for the Seventh Circuit rejected a similar claim in a Title VII action brought by an airline stewardess laid off under a facially neutral seniority system. Evans v. United Air Lines, Inc., No. 75-1481 (April 26, 1976). The Court held that the seniority system was an integral part of the defendant's discriminatory hiring practices.

Thus, it ruled that defendant's illegal actions were continuing ones for the purposes of the statute of limitations. Id. at 8. I find the reasoning of the Seventh Circuit persuasive. Since the discriminatory activities were of a continuing nature, the claim of laches must also fail.

Plaintiffs move for partial summary judgment as to 54 women who took the Exam Number 9081 for police woman in October 1969 and who were subsequently hired between January and November of 1973. It is claimed that but for the discriminatory practices of the Department, each would have been hired on May 8, 1970 when 125 males who took the corresponding Exam Number 9080, also given in October, 1969, became police trainees.

There is no dispute that the 125 police trainee slots were filled by men who received scores of 84% or higher and who were under 21 years of age at the time of the appointment. Of the 54 women for whom plaintiffs seek summary judgment, 49 received scores of 84% or higher on their October, 1969 exam. Each of these women was under the age of 21 as of May 8, 1970. In light of their subsequent hiring, there can be no dispute as to their other qualifications to serve.

Plaintiffs' counsel has conceded at oral argument that had these 49 women been eligible for appointment in

May, 1970, it would have had the effect of driving up the minimum test score. Thus when the men and the women who took October, 1969 exams are considered together, only persons with scores of 87% or higher would have been among the 125 persons hired. Thirty-eight women are in this category. These computations were not disputed by the City. I find that each of these women has satisfied the test established by the Court of Appeals. See page 2, supra.

In addition to these 38, five women seek to demonstrate their entitlement to relief based upon documentary evidence which would tend to establish a desire to become a police officer at a sufficiently early point in time to place them ahead of the men hired in May of 1970. Each of these women eventually became a police officer. I must conclude that summary judgment is inappropriate as to these individuals. Their claims, which may ultimately prove successful, are best left for a hearing.

Plaintiffs have also requested a preliminary injunction against the rehiring of any former police officers other members of plaintiffs' class until the rightful seniority of the class members is determined. Such an injunction appears to me to be unwarranted.

The entitlement of the class members other than the 38 has not been determined. Apart from the 54 for whom summary judgment has been sought, this Court has not been apprised of the circumstances of the other female police officers. Furthermore, the City has consented to inform the plaintiffs and this Court of any proposed hirings of police officers. The need for injunctive relief can be better evaluated when and if additional hirings are planned.

To expedite the claims of the remaining members of the class, a special master will be appointed pursuant to Rule 53, Fed. R. Civ. P. Plaintiffs have requested this procedure and defendants have indicated that they have no objection. An order of appointment will follow.

Plaintiffs are directed to forthwith settle an order certifying the class.

The motion for interim counsel fees is denied without prejudice to its renewal at a later point in this litigation.

There being no just cause for delay, partial summary judgment is granted as to the seniority status of the 38 female former police officers who took the October, 1969 exam and received a grade of 87% or higher. Rule 54(b), Fed. R. Civ. P. The defendants are hereby enjoined from rehiring from a seniority roster which does not reflect the proper status of these 38 women. Defendants' cross-motion for summary judgment is denied.

IT IS SO ORDERED.

Kevin Thomas Duffy

U. S. D. J.

New York, New York

July 16, 1976

# Order and Partial Summary Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BERALDINE L. ACHA and ARLENE M. EGAN,
each individually and on behalf of
all others similarly situated,

Plaintiffs,

-against-

ABRAHAM D. BEAME, etc., et al.,

Defendants.

~~PROPOSED~~ ORDER AND
PARTIAL SUMMARY
JUDGMENT

75 Civ. 3128

(KTD)

The plaintiffs, Beraldine Acha and Arlene M. Egan, each individually and on behalf of all others similarly situated, having moved this Court: (i) for an order, pursuant to Rule 23(c) of the Federal Rules of Civil Procedure and Rule 11A(c) of the Civil Rules of this Court, permitting this action to be maintained as a class action and defining the said class as the former female police officers whose employment with the New York City Police Department was terminated on or after June 30, 1975 solely for budgetary reasons; (ii) for an order, pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, enjoining, staying, and prohibiting pendente lite defendants and/or their agents, servants, officers, and/or employees from reinstating any former police officer, other than members of the class herein, whose employment with the New York City Police Department was terminated on or after June 30, 1975 solely for budgetary reasons, in or to a position in said Department during the pendency of this action; (iii) for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, in favor of 54 designated members of the class; (iv) for an order pursuant to 42 U.S.C. §2000e-5(k) granting the plaintiffs reasonable attorneys' fees and expenses; and (v) for such other and further relief as to this Court may seem just and proper, and the defendants having cross-moved this Court for summary judgment on the grounds that (i) this Court lacks jurisdiction over the City of New York under 42 U.S.C. §1983; (ii) plaintiffs fail to state a claim against the individual defendants under 42 U.S.C. §1983; (iii) the appropriate statutes of limitation bar plaintiffs' requests for relief under both 42 U.S.C. §1983 and Title VII; and (iv) the Court should deny plaintiffs' request for relief on the grounds of laches.

NOW, upon reading and filing the plaintiffs' notice of motion, the affidavits of Murray A. Gordon, sworn to May 27, 1976, and the exhibits attached thereto, the affidavit of Catherine DeLaRionda, sworn to May 5, 1976, and the exhibits attached thereto, the affidavit of Patricia W. Boyce, sworn to May 7, 1976, and the exhibits attached thereto, the affidavit of Mary D. Lenihan, sworn to May 7, 1976, and the exhibits attached thereto, the affidavit of Bernadette Fowler, sworn to

May 10, 1976, and the exhibit attached thereto, the affidavit of Clara A. Palumbo, sworn to May 7, 1976, and the exhibits attached thereto, the affidavit of Carol A. Grace, sworn to May 26, 1976, and the exhibits attached thereto, the affidavit of Ronald H. Shechtman, sworn to July 7, 1976, and the exhibits attached thereto, and the reply affidavit of Murray A. Gordon, sworn to July 14, 1976, and the exhibits attached thereto, the Rule 9(g) statement of the plaintiffs dated July 14, 1976, and the memorandum of law and the reply memorandum of law of the plaintiffs, all in support of the motions of the plaintiffs and in opposition to the cross-motion of the defendants; the defendants' notice of cross-motion for summary judgment, dated July 9, 1976, the affidavit of Michael J. Codd, sworn to July 9, 1976, the affidavit of Michael S. Cecere, sworn to July 14, 1976, and the exhibit attached thereto, the Rule 9(g) statement of the defendants dated July 8, 1976, and the memorandum of law of the defendants in opposition to the motion of the plaintiffs and in support of the cross-motion of the defendants; and upon all the papers and proceedings heretofore had herein; and upon hearing the argument of Murray A. Gordon, P. C., counsel for the plaintiffs, by Murray A. Gordon, Esq., in support of the aforesaid motions of the plaintiffs and in opposition to the cross-motion of the defendants, and W. Bernard Richland, Corporation Counsel of the City of New York, by Michael S. Cecere, Esq., counsel for defendants, in opposition to the motion of the plaintiffs and in support of the cross-motion for the defendants; and due deliberation having been had thereon; and upon the opinion and order of this Court, dated July 16, 1976 and filed on July 17, 1976, it is upon the motion of Murray A. Gordon, P. C., attorneys for plaintiffs

ORDERED that the motion of the plaintiffs to certify the class be and the same is hereby granted and that the action be and the same hereby shall be maintained as a class action under Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure on behalf of the plaintiffs, Beraldine Acha and Arlene M. Egan, and on behalf of all female police officers whose employment with the New York City Police Department was terminated on or after June 30, 1975 solely for budgetary reasons; and it is further ORDERED that the parties submit proposed orders and memoranda in support thereof on the question of notice to the members of the class; and it is further ORDERED that the cross-motion of the defendants for summary judgment be and the same is hereby denied; and it is further

ETD

ORDERED that the motion of the plaintiffs for counsel fees be and the same is hereby denied at this time without prejudice to the renewal thereof at a later point in this litigation; and it is further

ORDERED AND ADJUDGED that the motion of the plaintiffs for summary judgment be and the same is hereby granted as to the seniority status of the following members of the class who took the October 1969 New York City Police Department Examination No. 9081 for the position of Police Woman and received a grade of 87% or higher thereon and who were less than 21 years of age on May 8, 1970 (hereinafter referred to as "the 38 members of the class"):

Alicia C. Parker
Charlene A. Davey
Catherine Braun
Margaret M. Moore
Mary A. Boyd
Karen A. Drizan
Laura M. Quintero
Kathleen Sammon
Margaret O'Shaughessy
Veronica M. Risi
Kerry A. Schreiner
Patricia A. Scarlett
Kathleen M. Fraher
Patricia A. Kehoe
Rosalyn Yellin
Carol S. Kranick
Monica L. Sullivan
Jane E. Deacy
Janet A. Guardino
Eleanor M. Nola
Valarie A. Doran
Anita Matusiak
Gertrude A. Campbell
Yvonne M. Mitchell
Barbara J. Keany
Linda A. Miglino
Janis L. Stenborg
Ruthann T. Pitaro
Diane B. Broccoli
Mary J. Yakonenko
Donna M. Jones
Ellen E. Finn
Cahterine De La Rionda
June B. Donovan

Mary A. Ross
Patricia M. Doyle
Katherine Bridges
Maureen Collins

and it is further

ORDERED that plaintiffs' motion for summary judgment be and the same is hereby denied at this time with respect to members of the class other than the 38 members of the class, and that the remaining claims of all members of the class shall be referred to Renee Roberts a ~~a~~ Special Master to be appointed by this Court pursuant to Rule 53 to hear and report, Federal Rules of Civil Procedure; and it is further

KTD
KTD

ORDERED AND ADJUDGED that the defendants be and the same are hereby directed and ordered to fix and set the seniority of each of the 38 members of the class at a date no later than May 8, 1970, said seniority date to govern all applicable current and future terms, conditions, benefits and fringe benefits of employment including but not limited to current rate of compensation and subsequent incremental increases, future promotional opportunities, ~~tenure,~~ retention, future reinstatement, demotion, lay off, and ~~pension eligibility and~~ benefits, and current working conditions such as assignment, transfer, and vacation selection as may be affected by or conditioned upon seniority; provided, however, the right or entitlement, if any, of any of the 38 members of the class to displace or "bump" a present incumbent and/or to back pay and/or to retroactive pension con-

KTD
KTD

tributions into the Police Pension Fund shall be deferred for future determination or resolution; and it is further

ORDERED that the motion of the plaintiffs for a preliminary injunction be and the same is hereby denied at this time, except as otherwise herein provided, upon the understanding and condition that the defendants will promptly notify in writing this Court and counsel for the plaintiffs of any proposed hirings of police officers in advance of such hirings, and without prejudice to a renewal of the application of the plaintiffs for injunctive relief if and when additional hirings are planned; and it is further

ORDERED that the defendants be and same are hereby enjoined from rehiring any police officers from a seniority roster which does not reflect the proper status of the 38 members of the class as hereinbefore provided; and it is further

ORDERED that all other aspects of the relief sought by plaintiffs not hereinbefore disposed of shall be and the same are hereby deferred for future resolution or determination.

S/
KEVIN T. DUFFY
U.S.D.C.

Dated: ~~July~~ August 3, 1976
New York, New York

Judgment Entered - 8/4/76
Raymond F. Burghardt
Clerk

# Defendants' Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----------------------------------x

BERALDINE L. ACHA and ARLENE M. EGAN each individually and on behalf of all others similarly situated

Plaintiffs,

-against-

ABRAHAM D. BEAME, etc., et al.

Defendants.
-----------------------------------x

75 Civ. 3128
[K T D]
NOTICE OF APPEAL

SIRS:

NOTICE is hereby given that the defendants hereby appeal to the United States Court of Appeals for the Second Circuit from so much of the order and partial summary judgment entered herein on August 4, 1976 as directs defendants to fix seniority dates for 38 plaintiffs at a date no later than May 8, 1970.

Dated: New York, New York
August 30, 1976

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendants
Office & P.O. Address:
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New York, N.Y. 10007

BY ____________________
PATRICK J. ROONEY
Telephone: 566-4508

TO:

MURRAY A. GORDON, P.C.
Attorneys for Plaintiffs
666 Third Avenue
New York, New York 10017

Notice of Entry of Judgment Filed
September 3, 1976

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----------------------------------------x

BERALDINE L. ACHA and ARLENE M. EGAN, each individually and on behalf of all others similarly situated,

Appellants,

- against -

**NOTICE OF ENTRY**

Civ. 75-7388

ABRAHAM D. BEAME, individually and in his capacity as Mayor of the City of New York, MICHAEL J. CODD, individually and in his capacity as Police Commissioner of the New York City Police Department and THE CITY OF NEW YORK as a public employer,

Appellees.

-----------------------------------------x

SEP 3 P 2:45

SIRS:

PLEASE TAKE NOTICE, that the within is a true copy of a judgment with statement of taxed costs duly made and entered in the within action and filed in the office of the Clerk of the United States Court of Appeals, Second Circuit, on or about the 26th day of April, 1976

Dated: New York, New York
September 2, 1976

Yours, etc.

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TO: CORPORATION COUNSEL OF
THE CITY OF NEW YORK
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New York, New York

Michael S. Cecera, Esq.
Judith Levitt, Esq.
Gregory D. Frost, Esq.
Of Counsel

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of February one thousand nine hundred and seventy-six.

Present:

HON. IRVING R. KAUFMAN
Chief Judge

HON. J. JOSEPH SMITH

HON. WILFRED FEINBERG

Circuit Judges,

---

Geraldine C. Acha and Arlene M. Egan, each individually and on behalf of all others similarly situated,

Appellants

v.

Abraham D. Beame, individually and in his capacity as Mayor of the City of New York, Michael J. Codd, individually and in his capacity as Police Commissioner of the New York City Police Department and The City of New York, as a public employer.

Appellees.

75-7388

DOCKETED AS
A JUDGMENT # 76,368
ON April 26, 1976

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and ~~it hereby is~~ they hereby are reversed and that the action be and it hereby is remanded to said District Court for further proceedings consistent with the opinion of this court with costs to be taxed against the appellees.

(A true copy.
(
( Clerk
(

A. DANIEL FUSARO
Clerk
By VINCENT A. Carlin
Chief Deputy Clerk

Order of U. S. Court of Appeals Dismissing Defendants' Appeal

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

---

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 7th day of October, one thousand nine hundred and seventy-six.

Beraldine L. Acha, and Arlene M. Egan,
Each individually and on behalf of all
others similarly situated,
Plaintiffs-Appellees,
v.
Abraham D. Beame, individually and in
his capacity as Mayor of the City of
New York, Michael J. Codd, individually
and in his capacity as Police Commissioner of The City of New York, as a public
employer,
Defendants-Appellants.

76-8453

(T-6451)

The Civil Appeals Management Plan of this court having been promulgated on April 9, 1974 providing that within 10 days after filing a notice of appeal the appellant shall docket an appeal, by filing and serving a pre-argument statement (Form C), by ordering from the court reporter a transcript of the proceedings and filing and serving a statement concerning same (Form D) and by paying the docket fee and that in default of either of which the Clerk may dismiss the appeal without further notice,

And the appeal herein not having been so docketed,

Upon consideration thereof, it is

Ordered that the appeal from the order and judgment of the United States District Court for the Southern District of New York be and it hereby is dismissed.

OCT 8 - 1976

A. DANIEL FUSARO
Clerk

By: Vincent A Carlin
VINCENT A. CARLIN
Chief Deputy Clerk

# Special Master's First Interim Report

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------------------------------------X

BERALDINE L. ACHA and ARLENE M. EGAN, :
each individually and on behalf of
all others similarly situated, :

Plaintiffs, :

-against- :

ABRAHAM D. BEAME, et al., :

Defendants. :

----------------------------------------X

INDEX NO.
75 Civ. 3128

INTERIM REPORT
OF
SPECIAL MASTER

## PRELIMINARY STATEMENT

Plaintiffs are former female police officers whose employment with the New York City Police Department was terminated on or after June 30, 1975. They represent a class consisting of those female police officers who were laid-off on or after that date, solely for budgetary reasons.

This action was brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et seq., and 42 U.S.C. Section 1983 and the Fourteenth Amendment against The City of New York, its Mayor, and its Police Commissioner. The amended complaint alleges that since the lay-offs were based on seniority, they were sex-discriminatory because women had been prevented from obtaining the seniority necessary to avoid lay-off by defendants' unlawful discrimination against them in the past.

On August 3, 1976, Judge Duffy granted the plaintiffs' motion for summary judgment as to 38 members of the class and denied that motion with respect to the remaining members of the class. Judge Duffy ordered that the claims of those remaining members of the class be heard and referred them to me, as Special Master, to conduct hearings and report to him.

Pursuant to that Order, hearings were held* to determine, in accordance with the direction of the Court of Appeals, "which plaintiffs now laid off would have been hired early enough to obtain sufficient seniority to avoid lay off had it not been for defendants' discriminatory tactics" and to ascertain the facts necessary to a determination by the Court of the entitlement of those claimants to back pay.

This Interim Report is limited to the issue of seniority with respect to the 25 claimants who appeared and testified during the course of those hearings. A report covering the issue of back pay will be submitted at a later date.

---

*Hearings were held on September 30, 1976, October 1, 6, 7, 8, 12, 13, 14, 15, 19, and 22, and November 1, 1976. Counsel for both sides presented oral argument on October 29, 1976.

## INTRODUCTION

At the outset, it should be noted that certain general findings apply to all claimants.

The parties have stipulated that any member of the class represented by the plaintiffs who established that she was discriminated against by reason of her sex, with respect to a Police Department examination and subsequent appointment, shall be entitled to a seniority date which shall be the median appointment date from the eligibles list resulting from that examination, which date for such examination in question has been agreed upon between counsel.

In addition, I find that all claimants who have testified to date are members of the class represented by plaintiffs herein. All claimants possessed valid drivers' licenses and high school diplomas or the equivalent at the time of their appointment. The fact that certain claimants may not have had one or both of those prerequisites as of the date of claimed seniority is not, in the present posture of the case and in view of the fact that they obtained those prerequisites prior to the date of their actual appointment, reason to deny them such seniority. Other bases asserted for disqualification are dealt with infra on an individual basis.

Moreover, I find that credible oral testimony is sufficient to carry plaintiffs' burden of proof by a preponderance of the evidence. See EEOC v. Local 638, 12 F.E.P. Cases 755 (2d Cir. 1976).

In each instance, this Report focuses on the first overt act in furtherance of the claimant's intention to become a Police Officer. Subsequent specific acts have not been referred to where the effect would merely be cumulative.

## BERNADETTE FOWLER

BERNADETTE FOWLER was born on February 21, 1946, was appointed to the Police Department as a Policewoman on November 19, 1973, and was terminated on June 30, 1975. (Tr.10.)

In the Summer of 1965, claimant called the New York City Department of Personnel (Personnel) to request information for the examination for Policewoman and thereafter wrote a letter to Personnel requesting the appropriate information. (Tr. 12-14.) In response to claimant's inquiry, Personnel in July, 1965, sent claimant a form request for application which she completed and sent to Personnel. This form was returned to claimant with an application for the 1969 Policewomen's examination. (FOWLER, Exh. 1, Tr. 14-17.)

Claimant expressed a desire and took overt action to become a member of the Police Department prior to December 1, 1965, the beginning of the filing period for Examination No. 1557 for Patrolman. That examination was given on March 12, 1966 and the median appointment date from the eligibles list resulting therefrom was March 1, 1967. (Plaintiffs' Exs. 2 and 3.)

If Examination No. 1557 for Patrolman had not been limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment to the Police Department, and would have accepted such appointment. Accordingly, I find that claimant is entitled to a seniority date of March 1, 1967.

## MARY DOLORES LENIHAN

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MARY DOLORES LENIHAN was born on September 22, 1947, was appointed to the Police Department as a Policewoman effective August 31, 1973, and was terminated on July 1, 1975. (Tr. 54.)

In February, 1965, the claimant inquired as to information regarding appointment as a Police Officer at Personnel. She was given an application and the notice of examination for Examination No. 1382 for the position of Patrolman, Police Department. (Tr. 57-8, LENIHAN's Ex.1.) Claimant testified that she did not apply for that examination because it was limited to men. (Tr. 58.) However, the filing period for that examination was from January 18, 1965, through April 30, 1965. Applicants were required to have been at least 20 years of age at the time of filing the application (Plaintiffs' Exs. 1 and 2) which requirement claimant did not meet.

Subsequently, on June 10, 1965, claimant wrote to Personnel to complain that examinations for Policemen and Police Trainees were "open only to men" and that policewomen were "not appointed in equal numbers to policemen". (Tr. 58-9, LENIHAN Ex. 2.)

Accordingly, I find that claimant expressed a desire and took overt action to become a member of the Police

Department between February and July, 1965.

Examination No. 1455 for Police Trainee was given on March 12, 1966, and had a filing period from January 3, 1965 to November 30, 1965. (Plaintiffs' Exs. 1, 2, and 3.) The median appointment date of trainees from the eligibles list resulting from that examination was November 7, 1966. (Tr. 52, 126-7.)

Although claimant did not appear for the physical examination for a position in the New York State Narcotics Correction Department in 1969 because the $8,000 or $9,000 salary was insufficient (Tr. 124-5), I do not find that she would have refused the Trainee position three years earlier because it only paid $4,000 per year since the Trainee position provided for automatic maturation to Police Officer status upon reaching age 21, (Tr. 54, Plaintiffs' Ex. 3.), at which time, claimant would have received a substantial increase in salary.

If Examination No. 1455 for Police Trainee had not been limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment to the Police Department and would have accepted such appointment.

Consequently, I find that claimant is entitled to a seniority date of November 7, 1966.

## CLARA A. PALUMBO

CLARA A. PALUMBO was born on April 25, 1949, was appointed to the Police Department as a Policewoman on May 29, 1973, and was terminated for budgetary reasons on July 1, 1975. (Tr. 125-9.)

In 1965, a Police Department Policewoman spoke to the claimant at claimant's "Career Day" in high school and specifically discussed the duties of a Policewoman. (Tr. 130-1, 145, 148-9.) The Policewoman told claimant to write to the Police Academy to inquire about employment, which she did. (Tr. 131, 145.) Claimant received a written response dated November 24, 1965, to her "inquiry concerning employment" with the Police Department from Lt. William J. Wetterworth, enclosing the qualifications for the position of Policewoman and advising her that "the last examination for Policewomen was held in 1964 and we do not anticipate another until 1968". (PALUMBO, Ex. 1A, 1B.)

In addition, in 1966 or 1967, the claimant applied to attend the John Jay College of Criminal Justice and the College of Police Sciences of The City University, but her applications were rejected because she was not a police officer. (Tr. 133-6, PALUMBO Exs. 5 and 6.)

Accordingly, I find that claimant expressed a desire and took overt action to become a member of . . Police Department some time in 1965, prior to November 30, 1965.

Examination No. 1455 for Police Trainee was given on March 12, 1966, and had a filing period from January 3, 1965 to November 30, 1965. (Plaintiffs' Exs. 1-3.) The median appointment date of Trainees from the eligibles list resulting from that examination was November 7, 1966. (Tr. 126-7.) If claimant had been appointed on that date, she would have had to remain as a Trainee for approximately two and one-half years before maturing to a Police Officer at age 21. (Plaintiffs' Ex. 3, Tr. 128.)

Claimant testified that she did not want to be a secretary. However, she also testified that she knew the duties of a Trainee to be filing, paper work and typing, and would have accepted appointment as a Trainee if it had been offered to her on November 7, 1966. (Tr. 130, 146, 148-150.)

Based upon the foregoing, I find that claimant has established, by a preponderance of the evidence, her entitlement to a seniority date of November 7, 1966.

## MAUREEN KEMPTON

MAUREEN KEMPTON was born on July 18, 1944, was appointed a Policewoman in the New York City Police Department on May 29, 1973, and was laid off commencing July 1, 1975, solely for budgetary reasons. (Tr. 155-6.)

Claimant testified that in approximately March, 1965, she went to the 105th Precinct house in Queens Village, New York, to pick up applications for Examination No. 1382 for herself and for her husband, but was told by the Desk Officer that she could have only one application since the examination was only for men. (Tr. 158-9, 175-6, 188, 193) Subsequently, claimant contacted Personnel periodically and inquired when the next test was to be given. If the tests scheduled were for men, she asked why she was not able to take them. (Tr. 160, 179, 197.)

During the period 1966-1969, claimant applied for a position with the Nassau County Police Department but was denied an appointment. (Tr. 198-9, 202, KEMPTON Ex. 3.)

Examination No. 1382 was given for the position of Patrolman Group 3 on November 15, 1965, and the median appointment date from the resulting eligibles list was June 20, 1966. (Plaintiffs' Ex. 2, Tr. 154.) On that median date, claimant had three young children, the youngest of which was 18 days old. (Tr. 155-7.)

In view of the testimony of claimant's husband that she would not have accepted an appointment to the Police Department in 1966 (Tr. 194-6), and in view of the age of claimant's youngest child at that time, I find that she would not have accepted an appointment from the eligibles list resulting from Examination No. 1382.

Defendants argue that claimant wore glasses and had eyesight sufficiently poor to disqualify her for appointment to the Police Department. They also assert that claimant's eye condition became progressively worse. (DPF 6-8.)* I find that since claimant passed the Department's eye test in 1970 at a time when, according to defendants' theory her eyesight should have been at its worst, (Tr. 1371-3, DPF 6-8), it cannot be determined with sufficient certainty that her eyesight would have disqualified her at an earlier point in time.

Although I find that claimant would not have accepted an appointment to the Police Department in 1966, I find that her previously expressed intent to become a Police Officer continued and that if Examination No. 7065 for Patrolman-Trainee were open to women, she would have otherwise been eligible to take that examination, (Plaintiffs' Exs. 2 and 3), was otherwise qualified for appointment to the Police Department and would have accepted such appointment. The median appointment date from the resulting eligibles list was March 14, 1969, (Tr. 154), which I find to be the applicable seniority date for claimant.

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*Defendants' Proposed Findings.

## CAROL GRACE

CAROL GRACE was born on September 14, 1942, was appointed a Policewoman in The New York City Police Department on February 26, 1973, and was laid off on July 11, 1975. (Tr. 224.)

Claimant has four children who were born August 17, 1965, July 9, 1966, September 14, 1967, and July 16, 1968. (Tr. 236, 246.)

Claimant first expressed an intention to become a Police Officer in 1962 or 1963 by filing a written request for an application with Personnel. (Tr. 227-8; GRACE Ex.1A.) She received written notification of Examination No. 9728, but when she appeared for the examination, she was denied admission. (Tr. 228-31, GRACE Ex. 1B.)

The median appointment date from the Examination No. 9728 eligibles list was April 13, 1965, when claimant was pregnant. (Tr. 222, 236.)

Claimant took the 1964 examination for Policewoman which she passed, with a mark of 93. (Tr. 231-2; GRACE Ex. 2.) She did not take the medical and physical examination scheduled for May 13, 1965 because she was pregnant. (Tr. 232-4.)

Examination No. 8046 for Patrolman was given on July 20, 1968, four days after the birth of claimant's youngest child and the day that claimant left the hospital. (Plaintiffs' Ex. 2, Tr. 247.) Claimant testified that she would have left the hospital a day earlier and would have taken that examination if permitted to do so. (Tr. 247.) In view of claimant's prior actions in furtherance of her intention to become a Police Officer, I find that testimony to be credible. The median appointment date from the resulting eligibles list was June 30, 1969. (Tr. 223.)

Accordingly, I find that claimant has established, by a preponderance of the evidence, that if Examination No. 8046 were open to women, she would have taken that examination, would have otherwise been eligible to take that examination (Plaintiffs' Exs. 2 and 3), was otherwise qualified for appointment to the Police Department and would have accepted such appointment. In view of claimant's expression of desire and taking of overt action to become a member of the Police Department, as aforesaid, I find that she should be granted a seniority date of June 30, 1969.

## JOYCE FASCE

JOYCE FASCE was born on January 9, 1941, was appointed a Policewoman in The New York City Police Department on April 30, 1973, and was laid off on July 1, 1975. (Tr. 259-260.)

In 1965, claimant expressed an interest in police work to neighbors and called Personnel to inquire when the Policewomen's test would be given. (Tr. 261.) This intent continued until her appointment as a Policewoman and is evidenced by her attempt to take Patrolman's Examination No. 9019 given April 5, 1969. (Tr. 262.)

Examination No. 1382 was given for position of Patrolman on May 15, 1965. The filing period for that examination was from January 18, 1965 to April 30, 1965. The median appointment date from the resulting eligibles list was June 20, 1966. (Plaintiffs' Exs. 2 and 3, Tr. 259.)

If Examination No. 1382 were open to women, claimant would otherwise have been eligible to take that examination (Plaintiffs' Exs. 2 and 3), was otherwise qualified for appointment to the Police Department and would have accepted such appointment.

In view of claimant's expression of desire and taking of overt action to become a member of the Police Department in 1965, as aforesaid, I find that she should be granted a seniority date of June 20, 1966.

## DONNA CADWELL

DONNA CADWELL was born on July 15, 1942, was appointed a Policewoman in The New York City Police Department on April 30, 1973, and was laid off on July 1, 1975. (Tr. 283-4.) Claimant has two children who were born on May 17, 1962 and December 20, 1963. (Tr. 285, 298.)

Claimant called the Civil Service Department to apply for a Policewomen's examination and was told to submit a written request for an application, which she did in April, 1965. (Tr. 287, 292, 295, CADWELL, Exs. 1A, 1B, 2.) Claimant repeated the call and request in 1967. (Tr. 292-3, 331, CADWELL, Ex. 2.)

Examination No. 1382 was given for the position of Patrolman on May 15, 1965 and had a filing period from January 30, 1965 to April 30, 1965. (Plaintiffs' Exs. 2 and 3.) The median appointment date from the resulting eligibles list was June 20, 1966. (Tr. 282.)

If Examination No. 1382 for Patrolman had not been limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment and would have accepted such appointment.

In view of the foregoing and the fact that claimant expressed a desire and took overt action to become a member of the Police Department in 1965, as aforesaid, I find that she should be granted a seniority date of June 20, 1966.

## PATRICIA L. MINORE

PATRICIA L. MINORE was born on February 22, 1945, was appointed Policewoman in The New York City Police Department on May 29, 1973, and was laid off commencing July 1, 1975. (Tr. 335.)

In 1966, claimant wrote to Personnel to request a date to take the next Police Department test. (Tr. 357, 384.) In response, she received notification that the written test for Examination No. 6083 for Patrolman would be held on January 21, 1967, and an admission card to the medical and physical test for that examination on April 22, 1967. (Tr. 357, 384, MINORE Exs. 1 and 2.) There was no filing period for that examination which was a walk-in examination (Tr. 354.)

Although claimant was permitted to take Examination No. 6083, she was informed that since the examination was for men only, she would be disqualified. (Tr. 360, 366.) Claimant received a grade of 90% on the test. (Tr. 360.) Prior to the date of the physical and medical test, she was notified by both Personnel and the Police Department not to appear for the test. (Tr. 360-1.)

The median appointment date from the eligibles list resulting from that examination was April 3, 1968. (Tr. 354.)

If Examination No. 6083 were open to women, she would have otherwise been eligible to take that examination (Plaintiffs' Exs. 2 and 3), was otherwise qualified for appointment to the Police Department and would have accepted such appointment.

In view of claimant's expression of desire and taking of overt action to become a member of the Police Department in 1967, as aforesaid, I find that claimant is entitled to a seniority date of April 3, 1968.

## KATHLEEN SARRO

KATHLEEN SARRO was born on July 22, 1943, was appointed a Policewoman in The New York City Police Department on June 25, 1963, and was laid-off on July 1, 1975. (Tr. 393.) Claimant has two children who were born on December 7, 1964 and August 22, 1967. (Tr. 397.)

Claimant testified that the first time she discussed the matter of seeking employment in The New York City Police Department was in the Fall of 1965 when she discussed it with her husband. She stated that she placed the date because her husband was working in a butcher shop at the time and a woman customer mentioned to him that she wanted to become a Police Officer. When her husband came home, he mentioned the conversation with his customer to claimant. (Tr. 398-9.) Her husband testified to the same effect. (Tr.430-1.) Claimant further testified that she called Personnel in 1966, was told there were no examinations available for Policewomen and to read "The Chief" for announcement of such a test. Subsequently, claimant stated her husband bought "The Chief" and she read it (Tr. 400-1.)

However, between the years 1966 and 1969, when the aforementioned acts allegedly occurred, claimant worked only intermittently and part-time, usually during the Christmas rush season. (Tr. 418-20.)

Based upon my observation of claimant and her husband and their demeanor, the absence of any corroboration of their testimony and the fact that claimant, between the years 1966 and 1969, worked only intermittently and part-time, usually at Christmas, I conclude that the testimony of claimant and her husband is not credible. Accordingly, I find that claimant has not sustained her burden of proof by a preponderance of evidence and therefore is not entitled to a seniority date earlier than the one she presently has.

## CATHERINE DE LA RIONDO

CATHERINE DE LA RIONDO was born on February 3, 1950, was appointed a Policewoman in The New York City Police Department on May 29, 1973, and was laid off in July, 1975. (Tr. 445.)

In April, 1968, claimant wrote to Personnel requesting notification of the next Police Department Trainee examination and received an admittance card to Patrolman/Trainee Examination No. 8046 in response. (Tr. 447-9, DE LA RIONDO Ex. 1.)

Claimant appeared to take Examination No. 8046 on July 20, 1968, but was refused admittance on the ground that it was only open to men. (Tr. 449-50, DE LA RIONDO Exs. 2A, 2B, 2C.) The median appointment date from the eligibles list resulting from that examination was January 30, 1970. (Tr. 443-4.)

Thereafter, claimant filed a complaint with The New York State Department of Human Rights, which denied the complaint. (Tr. 451-2, 456, DE LA RIONDO Exs. 3A, 3B.)

If Examination No. 8046 for Trainee had not been limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment, and would have accepted such appointment.

In view of claimant's attempt to become a member of the Police Department in 1968, as aforesaid, I find that she should be granted a seniority date of January 30, 1970.

## MARJORIE HOGARTH

MARJORIE HOGARTH was born on April 13, 1939, was appointed Policewoman in The New York City Police Department on May 16, 1969, and reinstated on March 29, 1974. She was laid off on July 1, 1975. (Tr. 480-1.)

Claimant took the March 21, 1964 Police Department Policewoman's examination which she passed. (Tr.487, HOGARTH Exs. 1 and 2.) On the same date, Examination No. 9996, Group 1, was given for the position of Patrolman. (Plaintiffs' Ex. 2.) The median appointment date from the resulting eligibles list was July 9, 1965. (Tr. 478.)

If Examination No.9 996, Group 1, were not limited to men, claimant would have been eligible to take that examination, was otherwise eligible for appointment, and would have accepted appointment on July 9, 1965.

Defendants have raised the question of claimant's entitlement to a seniority date earlier than the one she now has, asserting that claimant waived such right when she was reinstated to the Police Department in March, 1974. (DPF HOGARTH 14.) Subject to a subsequent determination as to her entitlement to an earlier seniority date than the one she now has, I find that claimant is otherwise entitled to a seniority date of July 9, 1965.

## JOANN CATANESE

JOANN CATANESE was born on September 4, 1945, was appointed Policewoman in The New York City Police Department on October 1, 1973, and was laid off on July 1, 1975. (Tr. 545-7.)

Claimant testified that she had conversations with a friend between 1960 and 1964 with respect to a job in the Police Department. (Tr. 552.) She further testified that in January, 1964, she called Personnel from her mother's home and inquired about the Policewoman's test. She was told that she had to be 19 to take the test scheduled for March 21, 1964. (Tr. 550-1.) She asked about a Trainee position. (Tr. 568-9.)

A friend of claimant testified the call was made in her presence and on cross-examination stated that she remembered it because the claimant was very angry after making the call. (Tr. 551-2, 575, 579.)

Based upon the demeanor and testimony of claimant and her friend, I do not find it credible that claimant inquired about a Trainee position, or about the Policewoman's test in 1964, nor do I find it credible that claimant's friend remembered an isolated telephone call which occurred more than twelve years ago. Nonetheless, even if claimant did then inquire about the Policewoman's test, she was not otherwise qualified for the position because of her age. Accordingly, I do not find that claimant sustained her burden of proof by a preponderance of the evidence sufficient to establish entitlement to a seniority date earlier than the one she now has.

PATRICIA WHALEN BOYCE

PATRICIA WHALEN BOYCE was born on August 11, 1943, was appointed a Policewoman in The New York City Police Department on May 29, 1973, and was laid off on July 1, 1975. (Tr. 601-2.)

Claimant asserts that in 1960, in the presence of her father, she called Personnel and inquired about a Police Trainee or Cadet examination and was told it was for males only. (Tr. 608, 624-27.) The Trainee position did not exist until 1964. (Plaintiffs' Ex. 3.)

In 1962, when claimant graduated from High School, the yearbook listed her career choice as Policewoman. (Tr. 606-7,BOYCE Ex. 2.)

Claimant further asserts that she took the March 21, 1964 Policewoman's examination, which she failed, after taking a course at Delahanty's. (Tr. 612,628.) However, in a questionnaire she filled out prior to her appointment with the Police Department in 1973, she stated that she had not made prior application to the Police Department for employment. (Tr. 649, Defendants' Ex. A.)

In February, 1965, claimant wrote to Personnel and asked about Police Department examinations. (BOYCE Ex. 4.)

Between 1964 and 1969, claimant resided at R. F. D. No. 1, Anderson Road, Parksville, New York 12768. (Tr. 633, Defendants' Exs. A, B.) She was employed exclusively in Upstate New York and voted there. (Tr. 640-4.) Nonetheless, she stated that her legal residence was in Queens. (Tr. 629.)

Although no witness testified on claimant's behalf, and there were inconsistencies in her testimony as set forth above, the cumulative effect of her oral testimony and the documents submitted on her behalf establishes, by a preponderance of the evidence, claimant's expression of intention and taking of overt action to become a Police Officer before and during early 1965.

Examination No. 1382 for Patrolman was given on May 15, 1965. The filing period for that examination was January 18, 1965 to April 30, 1965. The median appointment date from the resulting eligibles list was August 1, 1966. (DPF 15, 16.)

If Examination No. 1382 for Patrolman were not limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of August 1, 1966.

## OLIVIA AMORISON

OLIVIA AMORISON was born on March 15, 1941, was appointed a Policewoman in The New York City Police Department on May 28, 1973, and was laid-off on July 1, 1975. (Tr. 666.)

In the latter part of 1965, claimant was having marital problems and made telephone calls to Personnel concerning the position of Police Officer for herself and her two brothers. She was told that there were no tests for females, only for Patrolmen. (Tr. 669-70, 685, 693-4, 696, 702.) One of her brothers took the Police Department examination in March, 1966, because the claimant notified him about it. (Tr. 693-4.)

In 1967, claimant indicated to Joseph Dean, a Suffolk County Police Officer,her interest in becoming a Police Officer and her inquiries concerning such employment. (Tr. 709.) In 1969, claimant took and passed an examination for Correction Matron in Nassau County and subsequently was appointed in that position. (Tr. 674-5, AMORISON Exs. 1A, 1B, 1C, 1D.)

Accordingly, I find that claimant expressed a desire and took overt action to become a member of the Police Department in late 1965 and subsequent thereto.

Examination No. 1557 for Patrolman was given on March 12, 1966. The filing period for that examination was between December 1, 1965 and February 25, 1966. The median appointment date from the eligibles list resulting from that examination was June 7, 1968. (Plaintiffs' Exs. 2 and 3, DPF 16.)

If Examination No. 6127 for Patrolman had not been limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment, and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of June 7, 1968.

## FRANCINE KRIPINSKI

FRANCINE KRIPINSKI, was born on January 18, 1946, was appointed a Policewoman in The New York City Police Department on September 27, 1974, and was laid off on July 1, 1975. (Tr. 720-1.)

Claimant first became interested in becoming a Police Officer at about the time her brother was appointed to The Housing Authority Police Department, which was in February, 1968. (Tr. 725.) She called Personnel to inquire about the next Policewoman's examination and was told to look for notice to be published in "The Chief", which she did. (Tr. 726-7.) Claimant discussed her interest with her brother, her father, and her cousin who is a Sargeant in The New York City Police Department. (Tr. 754, 764-772.)

Accordingly, I find that claimant expressed an interest in and took overt action to become a member of the Police Department in early 1968.

Examination No. 7065 for the position of Patrolman was given on May 11, 1968. The filing period for that examination was from April 3 to April 23, 1968. (Plaintiffs' Exs. 2 and 3.) The median appointment date from the resulting eligibles list was March 14, 1969. (Tr. 720.)

If Examination No. 7065 were not limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment and would have accepted such appointment.

At the time she was laid off, claimant was a probationary employee. Defendants have raised the question of claimant's entitlement to a seniority date earlier than the one she now has, asserting that probationary employees are not civil service, have no permanent status and, consequently, are not eligible for an earlier seniority date. (DPF KRIPINSKI 21.

I find that claimant is entitled to a seniority date of March 14, 1969 subject to a subsequent determination as to her eligibility for an earlier seniority date than the one she now has.

## GAIL PETERSON

GAIL PETERSON was born on November 1, 1948, was appointed a Policewoman in The New York City Police Department on May 29, 1973, and was laid off on July 1, 1975. (Tr. 783.)

Claimant first expressed an interest in becoming a Police Officer in early 1968. She called the Department of Personnel and asked about the positions of Police Officer and Trainee and was told women could not have either position. (Tr. 785-7.) She discussed her interest with her parents, a neighbor who was a patrolman assigned to the Emergency Service Division and her brother. (Tr. 809-10, 815-8, 824-5.)

Examination No. 7065 for Patrolman/Trainee was given on May 11, 1968; the filing period therefor was from April 3, 1968 to April 23, 1968, and the median appointment date from the eligibles list resulting therefrom was August 30, 1968. (Plaintiffs' Exs. 2 and 3, Tr. 783.)

Although in 1968 claimant was earning more money than the Trainee position, which was clerical in nature, paid, and claimant testified that she did not want to be a secretary, (Tr. 787, 802, Plaintiffs' Ex. 3), I do not find that testimony inconsistent with her acceptance of appointment as a Police Trainee at that time. (Tr. 788, 791-2, 805-6, 820, 828.) Moreover, if claimant were appointed a Trainee on August 30, 1968, she would have automatically matured to Police Officer status on November 1, 1969, her twenty-first birthday. (Plaintiffs' Ex. 3.)

If Examination No. 7065 were open to women, claimant would have otherwise been eligible to take that examination (Plaintiffs' Exs. 2 and 3), was otherwise qualified for appointment to the Police Department and would have accepted such appointment.

Accordingly, I find that claimant is entitled to a seniority date of August 30, 1968.

## KATHLEEN FOGARTY

KATHLEEN FOGARTY was born on November 28, 1948, was appointed to the position of Patrolwoman in The New York City Police Department effective as of April 13, 1973, and was laid off on June 30, 1975. (Tr. 834-5.)

It is undisputed that claimant went to Personnel with her friend, Eleanor Wright, in late 1965 or early 1966 during her Christmas vacation and inquired about the position of Police Trainee. (Tr. 838-40; DPF FOGARTY 18.) She was advised that women could not be Trainees. (Tr.840-1, 873-4.)

Claimant further testified that thereafter she purchased an Arco book to prepare for Police Department examinations and called Personnel to inquire if there was a police examination scheduled for which she was eligible and was told that none was scheduled. (Tr. 842-3.)

There is some uncorroborated testimony by claimant as to an earlier general expression of interest in the Police Department (Tr. 837-8, 863, 872) and a call to Personnel in 1964 about the upcoming Policewoman's examination for which she was not qualified by reason of age. (Tr. 839.)

Nevertheless, I find that claimant first expressed an interest and took overt action to become a member of the Police Department sometime in December, 1965 or January, 1966.

Examination No. 6127 for Police Trainee was given on April 1, 1967. Since that was a walk-in examination, there was no filing period for it. The median appointment date from the resulting eligibles list was October 9, 1967. (Plaintiffs' Exs. 2 and 3, DPF 15.)

If Examination No. 6127 for Police Trainee were open to women, claimant would have otherwise been eligible to take that examination, was otherwise qualified for appointment to the Police Department and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of October 9, 1967.

## PATRICIA D' ESPOSITO

PATRICIA D' ESPOSITO was born on March 31, 1945, was appointed a Policewoman in The New York City Police Department on May 29, 1973, and was laid off on June 30, 1975. (Tr. 886.)

Claimant testified that she called Personnel once every month, beginning in 1964. (Tr. 889-90, 902.) She also testified that she was not eligible to take the 1964 examination for Policewoman because of her age and that she did not inquire about the Trainee position because she knew it was not open to women. (Tr. 890, 902.)

Further, claimant testified that if she were offered a position as Police Trainee on June 20, 1966, when she was pregnant, she would have accepted it and would have gone on maternity leave. (Tr. 893-4, 903-4.) However, that testimony is inconsistent with the statement on her application that she remained unemployed from April, 1969, until her appointment as a Policewoman because she was "busy taking care of my family and my home." (Defendants' Ex. A.) Based upon her demeanor and other inconsistent statements such as the length of her employment at Boulevard Cleaners and the relationship between her and the owner of Boulevard Cleaners (Tr. 894-900, Defendants' Ex. A), I do not find her to be a credible witness.

In addition, a friend who worked with claimant between 1965 and 1966 testified that she overheard claimant calling Personnel to ask when a Policewoman's test would be available. (Tr. 922.) It strains credulity that this witness remembered that she overheard claimant's telephone calls to Personnel in 1965 and 1966, but did not remember other calls. (Tr. 922-4.)

On the basis of the foregoing, I find that claimant has not sustained her burden of proof by a preponderance of the evidence and, therefore, is not entitled to a seniority date earlier than the one she presently has.

## ELEANORE HURSON

ELEANORE HURSON was born on October 25, 1945, was appointed a Policewoman in The New York City Police Department in May 29, 1973, and was laid-off commencing July 1, 1975. (Tr. 931.)

Claimant initially called Personnel in October, 1965, to inquire about employment with the Police Department and when the next examination for Policewoman was scheduled. She was informed that there was no Policewoman's test scheduled at that time. (Tr. 932-3.) In addition, claimant's mother went to Personnel on her lunch hour from work at the New York City Municipal Building several times during 1964-1966 to inquire about the schedule of a Policewoman's examination. (Tr. 935, 965-7.) In October, 1966, claimant's mother picked up a request form for a Civil Service position application from Personnel, which form claimant testified she completed for the Patrolwoman's position and sent to Personnel. (Tr. 935-6, 949, 967, 976-7, 994.)

Accordingly, I find that claimant expressed a desire and took overt action to become a member of the Police Department beginning in October, 1965. Examination No. 1557 for Patrolman was given on March 12, 1965. The filing period for that examination was from December 1, 1965 to February 25, 1966. The median appointment date of the eligibles list resulting from that examination was March 1, 1967. (Plaintiffs' Exs. 2 and 3, Tr. 937, 967, 977-8, 991, 994.)

If Examination No. 1557 for Patrolman had not been limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment to the Police Department and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of March 1, 1967.

## MARIA SOLFO

MARIA SOLFO was born on December 4, 1943, was appointed a Policewoman in The New York City Police Department on May 29, 1973, and was laid off on June 30, 1975. (Tr. 1008.)

In March, 1965, claimant and her sister went to the Department of Personnel to inquire when the next test for Policewoman would be given. She was told that there would be no examination given in the near future. (Tr.1010.) Claimant subsequently called Personnel to make additional inquiries and during 1965, a co-worker also made several calls to Personnel on claimant's behalf. (Tr. 1011, 1046.)

Although claimant held various federal civil service positions between 1961 and 1969, I do not find such employment inconsistent with the aforementioned inquiries relating to employment in the Police Department. (Tr. 1027, 1029-30.)

Accordingly, I find that claimant expressed a desire and took overt action to become a member of the Police Department prior to April 30, 1965.

Examination No. 1382 for the position of Patrolman was given on May 15, 1965. (Plaintiffs' Exs. 2 and 3.) The filing period for that examination was from January 18, 1965 to April 30, 1965. The median appointment date for the eligibles list resulting therefrom was June 20, 1966. (Tr. 1007.)

If Examination No. 1382 for Patrolman had not been limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of June 20, 1966.

## KATHLEEN T. CASANO

KATHLEEN T. CASANO was born on April 28, 1948, was appointed a Policewoman in The New York City Police Department on June 20, 1973, and was laid off on July 1, 1975. (Tr. 1055-6.)

Claimant testified that she called Personnel in the Spring of 1966 when she was home from college to find out when the next entrance examination for the Police Department was scheduled. (Tr. 1058.) Her mother and a friend testified that they were present when that call was made. (Tr. 1086, 1091.) Claimant was a full-time student at Good Counsel College at that time and continued there on a full-time basis until June, 1968. (Tr. 1079-80.) She testified that she knew about the Trainee position, its duties, salary and maturation to Police Officer at age twenty-one and would have left college to accept appointment as a Trainee. (Tr.1061-2, 1082.) In view of the fact that claimant subsequently resigned a position as a teacher, for which she had trained at college, to become a Policewoman, (Tr. 1083), I find her testimony to be credible.

Accordingly, I find that claimant expressed a desire and took overt action to join the Police Department in 1966.

Examination No. 6127 for Patrolman/Trainee was given on April 1, 1967, at which time applications were issued and accepted for filing. The median appointment date from the resulting eligibles list was June 23, 1967. (Plaintiffs' Exs. 2 and 3, Tr. 1055.)

If Examination No. 6127 had not been limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment to the Police Department and would have accepted such appointment.

Consequently, I find that claimant is entitled to a seniority date of June 23, 1967.

## BARBARA YANETTI

BARBARA YANETTI was born on February 26, 1941, was appointed to The Police Department as a Policewoman on August 31, 1973, and was laid-off on June 30, 1975. (Tr. 1113.)

Claimant first became interested in becoming a member of the Police Department in July, 1965. (Tr. 1115, 1167.) After discussing it with her husband, he called Personnel and asked at his precinct to find out if tests were being given. He found out that they were not. (Tr. 1117, 1153, 1169-70.)

In addition, is is undisputed that claimant told her supervisor where she worked in 1965, her friend and the treasurer of the company at which she worked from 1965-1969 that she wanted to be a Policewoman. (Tr.:1185, 1189-91, 1197-9, DPF YANETTI 25.) From 1966-1969, claimant called Personnel - sometimes in the presence of her husband and sometimes at work after asking permission to use the telephone. (Tr. 1171, 1173-4, 1199-1200.) Her husband also called Personnel. Both of them were told that no test was scheduled and to keep calling. (Tr. 1171, 1173-4.)

Accordingly, I find that claimant expressed a desire and took overt action to become a member of the Police Department starting in July, 1965.

Examination No. 1506 was given on October 15, 1965. The filing period for that examination was from July 7, 1965 to October 1, 1965. (Plaintiffs' Exs. 2 and 3.) The median appointment date for Patrolman from the resulting eligibles list was September 26, 1966.

If Examination No. 1506 for Patrolman had not been limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment to the Police Department and would have accepted such appointment.

Based upon the foregoing, I find that claimant is entitled to a seniority date of September 26, 1966.

## MARIA T. GUARDINO

MARIA T. GUARDINO was born on September 5, 1946, was appointed a Patrolwoman in The New York City Police Department on June 30, 1973, and was laid off on July 1, 1975. (Tr. 1209-10.)

Claimant testified that she went to the 9th Precinct in 1965 to inquire about Police Department tests for females. (Tr. 1214.) Her husband and a friend testified that they told her to go to the 9th Precinct for information about those tests. (Tr. 1249, 1258.) However, neither one was present at those visits. All they testified to was what she reported to them. In addition, there were inconsistencies between the testimony of the witnesses and the testimony of claimant as to what else claimant did to evidence her intention to become a Police Officer. In addition, there were inconsistencies in claimant's own testimony. (Tr. 1253-5, 1265; Compare Defendants' Ex. C; Tr. 1211, 1226, 1228.)

Based upon my observation of the witnesses and their demeanor and an analysis of the testimony, I find that claimant did not sustain her burden of proof by a preponderance of the evidence sufficient to establish an earlier seniority date than the one she now has.

## BARBARA LEAHY

BARBARA LEAHY was born on September 21, 1947, was appointed a Policewoman in The New York City Police Department on June 25, 1973, resigned one week thereafter and was reappointed on November 27, 1974. She was laid off on July 1, 1975. (Tr. 1285-6.)

Claimant testified that she called Personnel in September or October of 1965. She was told that she was not eligible for the Trainee examination and that no Policewoman's examination was scheduled. (Tr. 1289.) Her mother testified that she overheard that call. (Tr. 1355.)

Claimant testified that she called Personnel again in 1967. (Tr. 1291.) Her mother testified that she overheard that call also. (Tr. 1357.)

Claimant's brother and sister-in-law also testified as to conversations with claimant about her interest in the Police Department. (Tr. 1332, 1344.)

Claimant and her three witnesses also testified that the reason for claimant's resignation from the Police Department was her brother's marital problems and the resulting family disruption. (Tr. 1293, 1336, 1346-7, 1359.)

Based upon my observation of claimant and the witnesses called on her behalf, and their demeanor, I find their testimony with respect to claimant's expression of interest in the Police Department prior to 1969 and the reasons for her resignation from the Police Department in 1973 not to be credible. Accordingly, I find that claimant has not sustained her burden of proof by a preponderance of the evidence and, therefore, is not entitled to a seniority date earlier than the one she presently has.

## PATRICIA NIELSEN

PATRICIA NIELSEN was born on September 5, 1941, was appointed a Policewoman in The New York City Police Department on May 29, 1973, and was laid off on July 1, 1975. (Tr. 1452B.)

Claimant was married on May 13, 1961. Her husband was and still is a Police Officer. (Tr. 1452F.) Despite the fact that she was married to a Police Officer since 1961, she stated that she did not become interested in becoming a Police Officer until the Summer of 1965, when she met a Policewoman while away in the country. (Tr. 1452C.) Claimant testified that thereafter her husband called Personnel outside of her presence and that she called Personnel as well. (Tr. 1452F, 1452D-E, 1493.)

Claimant's husband also testified that he called Personnel in late 1965 to make inquiries on his wife's behalf (Tr. 1492) but stated that he was not present when his wife called Personnel. (Tr. 1496.)

Claimant's first child was born on June 18, 1965, immediately preceding claimant's stated first expression of interest in becoming a Police Officer. In 197[illegible], claimant stated under oath that she left work in October, 1961, to stay home and start a family. (Tr. 1452F, Defendants' Ex. B.) Except for part-time work between November, 1968, and May, 1969, claimant held no full-time employment between 1961 and 1973. (Plaintiffs' Ex. 7, Defendants' Ex. B.)

Based upon the foregoing and upon the demeanor and testimony of all the witnesses, I do not find that claimant sustained her burden of proof by a preponderance of the evidence sufficient to establish entitlement to a seniority date earlier than the one she now has.

## CONCLUSION

The claims of the following should be allowed to the extent indicated above:

OLIVIA AMORISON
DONNA CADWELL
KATHLEEN T. CASANO
CATHERINE DE LA RIONDO
JOYCE FASCE
KATHLEEN FOGARTY
BERNADETTE FOWLER
CAROL GRACE
ELEANORE HURSON
MAUREEN KEMPTON
MARY DOLORES LENIHAN
PATRICIA L. MINORE
CLARA A. PALUMBO
GAIL PETERSON
MARIA SOLFO
BARBARA YANETTI

The claims of the following should be denied for the reasons set forth above:

JOANN CATANESE
PATRICIA D' ESPOSITO
MARIA T. GUARDINO
BARBARA LEAHY
PATRICIA NIELSEN
KATHLEEN SARRO

Determination of the claims of the following should be deferred pending a determination, as a matter of law, of claimants' entitlement to an earlier seniority date than the claimants now have:

MARJORIE HOGARTH
FRANCINE KRIPINSKI

Dated: New York, New York
January 17, 1977

Respectfully submitted,

Renee J. Roberts
RENEE J. ROBERTS

Opinion and Order of Hon. Kevin T. Duffy dated
February 25, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-------------------------------------x

BERALDINE L. ACHA and ARLENE M. EGAN, each individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

ABRAHAM D. BEAME, Etc.,

Defendants.

-------------------------------------x

75 Civ. 3128

BEFORE: HON. KEVIN THOMAS DUFFY,
District Judge

February 25, 1977
2:15 P.M.

APPEARANCES:

MURRAY A. GORDON, P. C.,
Attorneys for Plaintiffs,

W. BERNARD RICHLAND, ESQ.,
Attorneys for Defendants.
BY: MS. JUDITH LEVITT, ESQ.,
MICHAEL CECERE, ESQ.,
LT. PAUL BRENNAN.

THE COURT: You fellows put me under somewhat of a time bind. You didn't do it intentionally. I'm not blaming anyone for it. The fastest way I can get this done is to do it on the record.

O P I N I O N - Hon. Kevin Thomas Duffy,

District Judge

This is a class action brought by former female police officers of the New York City Police Department alleging sex discrimination on the part of their former employer in violation of Title VII of the Civil Rights Act of 1964 and other provisions of law. This action has been summarized in prior opinions and does not require repetition.

See 401 F. Sup.816 (S.D.N.Y.1975); 531 F.2d 648 (Second Circuit 1976); Opinion and Order, (S.D.N.Y. July 16, 1976).

By order of August 3, 1976, I appointed Renee J. Roberts, to act as Special Master pursuant to Rule 53, of the Federal Rules of Civil Procedure, to hear and report on claims of class members not within the scope of my summary judgment order. Special Master Roberts has presided over a number of days of hearings, including the taking of some 1,700 pages of testimony.

On January 7,1977 she issued her Interim Report to this court covering the claims of 25 members of plaintiffs' class. The Special Master found that 19 women were entitled to adjusted seniority dates and rejected the claims of six others.

The plaintiffs have moved under Rule 53(e)(2) of the Federal Rules of Civil Procedure to adopt the report of 17 of the 19 claimants found entitled to retroactive seniority. In the Special Master's report she indicated that additional fact-finding was required as to the eligibility of two of the 19, Majorie Hogarth and Francine Kripinski. Plaintiffs have also moved to reject the findings as to the six found not entitled to relief.

The defendants have cross-moved to have the Special Master's report adopted in the cases of the six rejected claimants and to have the report set aside in the cases of 17 of the 19 women who claims were accepted. The defendants have interposed objections as to the Hogarth and Kripinski findings. However, they do not oppose the findings of the Special Master in the cases of Patricia L. Minore and Catherine DeLariondo.

I find I must reserve on the cases of the claimants Hogarth and Kripinski. The unopposed findings as to claimants Minore and DeLariondo are adopted.

I have received extensive submissions addressed to the Interim Report of the Special Master. The transcripts of the proceedings together with the exhibits have been submitted for my review. On February 16, 1977 I heard argument from everyone interested in this case and took testimony as to a particular point which had not been covered in the testimony taken by Mrs. Roberts, and now it is time for me to rule on the contested claims.

Rule 53(e)(2) of the Federal Rules of Civil Procedure sets forth the standard for reviewing the Special Master's factual determinations:

"In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous."

The reason for the rule is obvious. It is because the Special Master, as the person hearing the witnesses, is in a unique position to assess their credibility. The Special Master has the opportunity to observe the demeanor of the witnesses, their candor, their possible bias and the strength and accuracy of their recollection. For these reasons, Mrs. Roberts is best able to judge who is telling the truth.

The "clear erroneous" standard which applies to the findings of fact has no application to the Special Master's conclusions of law. Those conclusions are given no special weight. They are accepted only to the extent that they represent the correct statements of law.

See Bravman v. Bassett Furniture Industries, Inc., 64 Federal Rules Decisions 4, and you'll find the quotation I'm referring to basically at page 7 (Eastern

District Wisconsin 1974), which was affirmed 519 Federal 2d. 1406 (7th Circuit 1975).

For further cases, see 5A Moore's Federal Practice paragraphs 53.12 (5) (2nd Edition 1974).

In those instances where the Special Master's findings involves mixed questions of law and fact they are "subject to a scrutinizing and careful review."

See United States against International Business Machines Corp., 66 Federal Rules Decisions 154, particularly at 159 (Southern District of New York, 1974), the case handled and presently being handled by Chief Judge Edelstein. In there he quotes also from Moore's Federal Practice Volume 5A, 53.12 (5).

With these principals in mind, we now examine the individual cases:

Kathleen Sarro and her husband testified as to her desire to join the New York City Police Force beginning in the fall of 1965. The Special Master noted that Mrs. Sarro worked only intermittently and part-time during the period for which seniority is claimed, and rejected her testimony and the other testimony presented on her behalf as "not credible."

I conclude that the Special Master's finding that Kathleen Sarro is not entitled to retroactive seniority is not clearly erroneous, so it is therefore accepted and adopted.

In the case of Joanne Catanese the Special Master did not credit testimony of the claimant and one of her friends that she made a single phonecall in January of 1964 at the age of 19 to inquire as to a policewoman's test and about trainee positions. I accept and adopt the Special Master's findings, rejecting the claim of Joanne Catanese.

The Special Master found inconsistencies in the testimony of Patricia D'Esposito regarding the length and nature of employment. Although Mrs. D'Esposito apparently testified that she would have accepted a police trainee position in June of 1966 while she was pregnant, her subsequent application to the police department stated that the reason that she had not worked at other jobs was because she was "busy taking care of my family and my home." The Special Master's finding that Patricia D'Esposito is not entitled to an adjusted seniority date is accepted and adopted.

The Special Master chose not to credit the testimony of Marie T. Guardino and her witnesses. As I mentioned previously, the Special Master was in the unique position to observe the witness' demeanor and judge whether they are telling the truth. I conclude that the Master's findings as to Mrs. Guardino are not "clearly erroneous," and they are therefore accepted and adopted.

In the case of the claimant Patricia Nielsen the testimony indicated interest on her part to become a police officer as early as 1965. However, on June 18, 1965 her first child was born. On April 23, 1973 Mrs. Nielsen wrote to the Police Academy the following:

"I was married in May 1961 and worked until October 1961. At this time I left work to stay home and start a family. Since 10/61 I have held only part-time jobs."

This statement made well before this lawsuit was commenced is perhaps a better indication of Mrs. Nielsen's true intentment and true availability for police work. The Special Master's report rejecting her claim is adopted

The Special Master found that Barbara Leahy was not entitled to an adjusted seniority date. The testimony of the witnesses regarding her expressions of interest was found not to be credible by the Special Master. Furthermore, Miss Leahy resigned from the police department one week after her appointment on June 25, 1973. She was reappointed in November, 1974. The Special Master could well have found that the abrupt resignation belied the testimony of the claimant as to an early desire to become a police officer. The report as to Barbara Leahy is adoped.

The Special Master found that Maureen Kempton was entitled to an adjusted seniority date of March 14, 1969. There was testimony concerning unsuccessful, but overt, attempts to apply for earlier New York City Police Officer exams. In addition, there was proof that she did in fact apply to take the June 28, 1969 exam to become a Nassau County Police Officer.

The defendants argued that Mrs. Kempton's eyesight would have kept her from becoming an officer. The Special Master found to the contrary. The very fact that she was thereafter appointed to the force adds special emphasis to the finding of the Special Master and I will not set aside those findings as "clearly erroneous." Accordingly, the Master's report is adopted as to Maureen Kempton.

In July, 1965 Bernadette Fowler obtained a "request for application form" from the New York Department of Personnel for the policewomen's exam. She returned the form but did not receive an application until the 1969 examination. The Special Master found that Mrs. Fowler would have taken the March 12, 1966 Patrolman's exam had it been open to women. The Special Master, therefore, set a seniority date of March 1, 1967. In order to set the revised seniority date, the Special Master utilized the median appointment date of all persons who took a particular exams. This procedure was used in each case and was agreed to by the parties. The report is adopted as to Bernadette Fowler.

A witness at the hearings was one Donald F. Green a patrolman with the Emergency SErvice Division of the New York City Police Department. He testified that he moved next door to the home of claimant Gayle Peterson in April, 1967 and that shortly thereafter they spoke in general terms of her interest in becoming a police officer. By the end of 1967, Green testified that the claimant Peterson was definitely interested in a police officer's position.

Peterson testified that beginning in January of 1968 she called the Department of Personnel regularly and read "The Chief," which is a newspaper still extant in the City of New York which carries civil service news, and Miss Peterson indicated that she did so to determine if any examinations would be given for police positions.

She learned that women were only eligible for policewomen's exams, and she, therefore, took the first available policewoman's exam, which was in 1969.

The Special Master found that had the May 11, 1968 patrolman/trainee exam been open to women, that Gayle Peterson would have taken it and, therefore, set a retroactive seniority date of August 30, 1968. I accept and adopt these findings.

Kathleen Castanno testified that her father and two brothers and an uncle were all members of the police force. While home from college in the spring of 1966 she testified that she telephoned the New York City Personnel Department to find out about the next police examination for which she was eligible. The Special Master accepted her testimony that she would have left college to take the trainee's position had it been open to her. This finding is supported by the fact that she ultimately resigned from a teaching position to accept an appointment as a policewoman. I adopt the finding that Kathleen Castanno would have taken the April 1, 1967 patrolman/trainee exam had at that time that option been open to her. Accordingly, she will have a retroactive seniority date of June 23, 1967.

Maria Zolfo first became interested in employment in the New York City Police Department in her senior year of high school. She did not apparently pursue that interest until early 1965 when she called the Department of Personnel to learn of a schedule for policewomen's examinations.

In March, 1965 Miss Zolfo and her sister, Grace Vitale, went down to the Department of Personnel to obtain additional information. Although no policewoman exams were forthcoming, she continued her interest and wrote directly to the Police Commission sometime in 1967. She was informed that the City had reached its quota for policewomen. Special Master Roberts found that Miss Zolfo would have taken the May 15, 1965 exam and, therefore, the Special Master awarded her a seniority date of June 20, 1966. These findings are adopted.

Miss Joyce Fasce telephoned the Department of Personnel to inquire about a policewoman's examination in late 1964 or early 1965. She learned that an examination for policewoman had recently been given but that the next examination would not be given for a few years. In April, 1969 Miss Fasce was the subject of press coverage when she attempted to take a "male only" New York City Patrolman's examination.

See for example, Fasce Exhibit 1.

The Special Master found that had women not been excluded, Joyce Fasce would have taken Examination Number

1382 given on May 15, 1965. A revised seniority date of June 20, 1966 was, therefore, set by the Special Master, and I adopt this finding.

In response to her written inquiry, Carol Grace, formerly Carol Marrone, received notification of Examination Number 9728 given on September 14, 1963. When she arrived to take the examination Mrs. Grace was informed that she could not do so because she was a woman. On March 21, 1964 she took the New York City Policewoman's Exam and passed. The medical and physical examination was scheduled for May 13, 1965, but she declined to take it because at that time she was pregnant with her first child. As a result, she was placed at the bottom of the appointment list.

The Special Master declined to give Mrs. Grace a revised seniority date based on the September 14, 1963 exam because that would have resulted in a finding that Mrs. Grace would have been appointed on April 13, 1965, exactly one month prior to the time when she declined to take the medical examination because at that time she was six months pregnant.

The Special Master did find that Mrs. Grace would have taken Examination 8046, administered on July 20, 1968. On that date, Mrs. Grace was in the hospital following the birth of her youngest child on July 16. The Special Master found that the claimant would have left the hospital a day earlier than she did in order to take the examination. Inducing the birth of a child sometimes as much as two weeks or three weeks prior to the date of expected birth is not unknown.

Retroactive litigation which seeks to determine what persons would have done had facts been different -- in this case had women not been excluded from certain police exams -- is by its nature incapable of achieving precise results. In view of Mrs. Grace's strong determination to join the police force as evidenced by her attempt to take the 1963 exam, and having taken the 1964 and 1969 exams, I cannot conclude that the Special Master's finding is "clearly erroneous."

Mrs. Grace received a grade of 93 percent on the 1964 exam, and it is reasonable to assume that she would have only required minimal preparation. It also appears that her family at that point was being completed by the birth of a fourth child on July 16, 1968. When the policewoman's exam was given on October 25, 1969, Mrs. Grace saw fit to take it and ultimately to accept appointment on the police force. I, therefore, adopt the Special Master's findings in the case of Carol Grace.

Turning to the next group of claimants, the principal dispute between the parties centers around an issue of law decided in plaintiff's favor by the Special Master. The question can be simply put as follows: Apart from disqualification based on sex,which has already been ruled unlawful, may an adjusted seniority date be awarded to a claimant who lacked, as of that particular date, an absolute prerequisite to appointment?

In order to have been appointed as a police trainee, an individual must have been 17 years of age and possessed a high school diploma or a high school equivalency diploma.

To become a patrolman, an individual must have been 21 years old and possessed both a valid driver's license and a high school diploma or equivalency diploma as of the date of appointment. In addition, trainees and patrolmen must have been residents of New York City, Nassau, Suffolk, Rockland or Westchester Counties.

These requirements, I am informed, are considered to be by the City appointing officials to be non-discretionary. I must decide whether the relief provisions of Title VII of 42 United States Code Section 2,000e-5(g), a seniority date be revised to a date when one of these mandatory qualifications was lacking.

To begin with, there is no allegation that the aforementioned mandatory qualifications were in any way linked to defendants' discriminatory practices. No claim has been made that the requirement of a driver's license or high school diploma was a subterfuge to exclude women. In connection with that take a look at EEOC versus Local 638, "The Sheet Metal Workers case,"532 F. 2d 821, and particularly at 825 (Second Circuit 1976).

Plaintiffs' primary argument is that the issue has already been ruled upon in their favor by this court and the Court of Appeals. For example, they cite the following statement from the Court of Appeals opinion:

"Relief will, of course, be limited to persons who eventually were accepted as police officers, so there is no question about their qualifications for the job."

That is at 531 Federal 2d at 656, and you can also take a look at the Opinion and Order of July 16, 1976, page 5.

I, however, do not agree with the plaintiffs' interpretation of this language. It is true that since each class member was appointed to the police force she at some point in time possessed all of the necessary qualifications, but the Court of Appeals has indicated that in order to recover, in order to have the seniority date adjusted, it must be established that except for the defendants' discriminatory practices, the individual would have been appointed at an earlier date. That is at 531 Fed. 2d at 656.

Therefore, there really are two elements which must coalesce in point of time: First, an individual must have had the desire and intent to become a police officer and, second, an individual must have possessed all of the requirements for appointment.

Now, each of the members of plaintiffs' class meet the second element. But the seniority date can only be adjusted to a date when the first and second elements were present together. Just as it would be illogical to revise seniority to a date when a class member possessed all the qualificarions but lacked a desire or intent to become a police officer, so too is it illogical to revise seniority to a date when a manatory qualification was lacking.

I must, however, place one qualification on my own analysis, and that relates to the requirement of residency within certain counties. A person cannot by force of will change his or her age. A person, however, can take steps to obtain a driver's license, but the individual must first develop driving skills and then pass a state administered examination. Basically, the same way be said of a high school school diploma, except, perhaps, that the conditions there may be more arguous and time consuming. But residency is a different thing to be considered. A person can solely by choise, change the county of residence at any time he or she desires. Therefore, if it is established that a claimant possessed all other qualifications and would have moved to a proper county to accept a policy assignment, then she can receive an adjusted seniority date.

The only case in which this issue is raised is that of Patricia Whalen Boyce. The claimant produced an elementary school autograph book from P.S. 192. On the page labeled "My favorites," there was a line for profession. Next to it, the then Miss Whalen wrote "policewoman." A yearbook from Thomas Jefferson High School also indicates that her carrier choice was that of a policewoman. In 1963 she took a police training course at the Delehanty Institute. Miss Whalen took the March 21, 1964 policewoman's exam but failed by less than a point.

The testimony indicates that up until 1964 claimant resided with her parents at 516 Sutter Avenue in Brooklyn. When her parents moved to Parksville, New York in Sullivan County, Patricia whalen moved in for a brief period with an aunt in Jamaica, Queens. She claimed legal residence at that Jamaica address from 1964 to 1969. But the Special Master did not credit her testimony on this point. It seems that beginning in September 1964 the claimant resided at her parent's home in Parksville. From 1964 to 1972 she worked in a series of jobs in the upstate communities around Sullivan County. In 1969, when the policewoman's examination was again given, claimant took a course again at Delehanty's and this time passed the examination. On May 29, 1973 she was appointed to the New York City Police Department.

The Special Master found that had the May 15, 1965 examination for patrolman been offered to women, Patricia Whalen Boyce would have taken it and would have been appointed on August 1, 1966.

Although the claimant did not meet the residency requirement in 1966, I will accept the Special Master's findings that she would have been appointed at that time. The proof indicates that the claimant's roots were not firmly settled in either Sullivan County or in New York City. When her parents moved upstate she stayed in the City for a brief period, but then joined them. She was unmarried throughout this timeperiod. Patricia Whalen was not tied to an upstate career, rather she held four different jobs while living up in Parksville. When the 1969 examination for policewoman was announced, Patricia Whalen Boyce took a preparation course in Manhattan. In 1973 she returned to New York City on a permanent basis and accepted a police department appointment. The Special Master's finding will be accepted and adopted.

I will now consider the individual cases of women who lacked either a driver's license or a high school diploma on the date of their revised seniority. Clara A. Palumbo received a revised seniority date of November 7, 1966. She did not obtain her driver's license until 1969 and was not appointed to the police force until May 29, 1973. Her case will be remanded to the Special Master to revise her seniority to a date no earlier than the date she passed her driving examination.

Kathleen Fogarty passed the driver's license examination on her third try sometime in 1973. However, she was awarded a revised seniority date of October 9, 1967. Her case is also remanded to the Special Master along with the testimony taken by this court that as soon as Miss Fogarty was appointed to the police force she was assigned to a squad car and drove in various precincts around New York City.

Donna Cadwell, who received a revised seniority date as of June 20, 1966, and obtained her driver's license in March of 1971, after having failed the first time that she took the driver's test, her case is likewise remanded.

Mary Delores Lenihan obtainer her driver's license in 1969. However, she was awarded by the Special Master a seniority date of November 7, 1966. That case is also remanded.

Although Barbara Yanetti did not receive a high school diploma until May, 1969, her seniority date was revised from August 31, 1973 to September 26, 1966. Her case is also remanded.

Eleanor Hurson was awarded a high school diploma in June 1969. Her seniority date was revised, however, to March 1, 1967. Her case is likewise remanded.

Olivia Amorison was granted a seniority of June 7, 1968, but did not receive her diploma until sometime in 1969. Likewise, her case is remanded.

The parties are directed forthwith to settle an order in conformity with the rulings that I have made to be submitted by Tuesday next.

Deputy Commissioner Lorenzo Casanova of the New York City Police Department has submitted, by letter of February 18, 1977, the substance of an agreement between the parties on the matter of reinstatement of those class members awarded revised seniority dates. The bottom of the letter reflects the signed consent of all counsel. I will adopt the agreement and you may include it as part of the order of this court.

It seems incumbent upon me to suggest at this point that all counsel meet early next week, with or without the Special Master, to determine if a new revised seniority date can be agreed upon in the cases of the individuals whose claims were remanded. The parties are directed to report their progress by noon on Wednesday, March 2.

U.S.D.J.

New York, New York
February 25, 1977

# Special Master's Second Interim Report

## PRELIMINARY STATEMENT

This Second Interim Report is limited to the issue of seniority with respect to 31 claimants who appeared and testified during the course of hearings held on December 14, 15, 20, 1976; January 12, 14, 18, 21, 25, 28, 1977; February 8, 9, 11, 16, 17, 18, 22, 23, 24, and 25, 1977.

A Report covering the issue of those claimants' entitlement to back pay will be submitted at a later date.

The general findings contained at Pages 3 and 4 of my Interim Report dated January 17, 1977, also apply to this Second Interim Report except in those instances where claimant did not possess a high school diploma or a high school equivalency diploma or a driver's license on the date to which I found claimant was otherwise entitled to retroactive seniority. Pursuant to the Decision of Judge Duffy dated February 25, 1977, the seniority dates of those claimants have been adjusted to a date no earlier than the date claimant obtained the aforementioned diploma or license.

## LOUISE SIMONELLI

LOUISE SIMONELLI was born on August 9, 1949, was appointed a Policewoman in The New York City Police Department on July 30, 1973, was laid off on July 1, 1975, and has not been reinstated. (Tr. 1730-3.) Claimant is unmarried and has no children. (Tr. 1734.) She received a high school diploma in June, 1967, and a driver's license in 1968 or 1969. (Tr. 1733.)

Claimant called the Policewomen's Bureau of the Police Department approximately once a month during her senior year in high school to inquire about examinations for Policewomen. (Tr.1735-6.) She testified that she was told not to call so often, to buy The Chief, and an Arco book. (Tr.1736- 7.) Her mother, her sister and a friend who was also interested in the Police Department, were present when she made the calls. (Tr.1766-7,1776-7,1792.) During her senior year in high school, claimant purchased The Chief to see if tests for women were scheduled and purchased an Arco book which she studied. (Tr.1737, 1752-3.) She knew of the trainee position but was told it was only open to men. (Tr.1740-1.)

Defendants assert that claimant would not have been eligible to take an appointment in the Police Department prior to the date of her actual appointment because at certain times she would be compelled to take off from work to assist with the care of her brothers and sister because of her mother's serious back condition. (DPF 11.) However, in view of the contrary testimony of claimant and her mother that, while claimant left a job as a waitress to assist her mother, the mother's condition would not have deterred claimant from accepting a position in the Police Department (Tr. 1788, 1780), I find that claimant would have accepted a position in the Police Department despite her mother's ailment.

Examination No. 7017 for Trainee was given on June 3, 1967. It was a walk-in examination. The median appointment date from the resulting eligibles list was January 29, 1968. (Plaintiffs' Ex. 3, Tr. 1731.)

If Examination No. 7017 for Trainee was not limited to men, claimant would have been eligible to tak that examination, was, except as indicated below, otherwise eligible for appointment* and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of January 29, 1968, which date, pursuant to the decision of Judge Duffy, should be adjusted to no later than the date on which she obtained her driver's license*.

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*In each instance where claimant lacked a driver's license or a high school diploma or a high school equivalency diploma on the retroactive seniority date, that date, pursuant to the Decision of Judge Duffy, either has been adjusted on the basis of the facts already in the record or will be adjusted at a later date after investigation into the facts relating to the date claimant obtained the diploma or license.

## BERALDINE L. ACHA

BERALDINE L. ACHA was born on December 18, 1941, was appointed a Policewoman in The New York City Police Department on May 29, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 1811-3.) Claimant is married, and has one child who was born in August, 1965. (Tr. 1816.) She received a high school diploma in June, 1960 and a driver's license in May, 1973. (Tr. 1813-4.)

In the Fall of 1965, claimant called the Policewomen's Bureau to inquire about available examinations for police officer. (Tr. 1816-8, 1849, 1881-2.) She was told that there were no examinations coming up. She left her name and address. Claimant's mother was present when that call was made. (Tr. 1818-9, 1852, 1873-5.)

Approximately one year later, claimant called a Captain Manino at the employment division of the Police Department to ask about examinations, was told none was scheduled, and she left her name "to be notified." (Tr. 1819-20, 1848-50, 1853, 1875-6.)

Examination No. 1557 for the position of Patrolman was given on March 3, 1966. The median appointment date from the eligibles list for Examination No. 1557 was March 1, 1967. (Plaintiffs' Ex. 1, DPF 16.)

If Examination No. 1557 for Patrolman had not been limited to men, claimant would have been eligible to take that examination, was, except as indicated below, otherwise eligible for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of March 1, 1967, which date, pursuant to the direction of Judge Duffy, should be adjusted to May , 1973.

## PATRICIA ANN COLLINS

PATRICIA ANN COLLINS was born on July 19, 1941, was appointed a Policewoman in The New York City Police Department on July 30, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 1897-8.) Claimant is married and has one child who was born on December 9, 1963. (Tr. 1899.) She received a high school diploma in June, 1959, and a driver's license no later than 1967. (Tr. 1899-1900.)

Claimant applied to take the 1964 Policewomen's examination, received an admission card to that examination, but elected not to take it because her son was 3 or 4 months old. (Tr. 1902, 1918-9.) Thereafter, from 1965 through 1968, she began writing to and calling the Department of Personnel about once a year, inquiring about the next examination for Policewoman. (Tr. 1903-5, 1924, 1930-2, 1950.) Her husband testified that he was present when some of the calls were made and that he saw some of the letters. (Tr. 1931-2.) She discussed her interest in the Police Department with her husband, other members of her family and a friend, EILEEN EGAN. (Tr. 1905, 1925, 1940-1, 1945.)

Defendants argue that claimant was concerned with the welfare of her child, and did not intend to become a Policewoman until 1969 when her son became of school age. (DPF 17-19.) However, claimant returned to work in July, 1967, when she began selling insurance for METROPOLITAN LIFE. (DPF 15, Tr. 1913.)

Examination No. 6069 for Patrolman was given on October 22, 1966. The filing dates were from August 3, 1966 to September 30, 1966 and the median appointment date from the eligibles list resulting from that examination was February 9, 1968. (Plaintiffs' Ex. 1, 3, Tr.1897.)

If Examination No. 6069 for Patrolman had not been limited to men, claimant would have been eligible to take that examination, was otherwise eligible for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of February 9, 1968.

## GLORIA OEST

GLORIA OEST was born on January 11, 1946, was appointed a Policewoman in The New York City Police Department effective March, 1973, was laid off on July 9, 1975 and has not been reinstated. (Tr. 1955-7.) Claimant was married from 1969 to 1975 and had one child who was born in 1964 and was placed for adoption immediately after birth. (Tr. 1957-8.) She received a high school diploma on 1963 and obtained a driver's license in 1973 in connection with her appointment to the Police Department. (Tr.1956-7.)

Claimant and her father, a retired police officer, testified that claimant's father inquired about a police examination she could take and was told that "there was an exam the year before (1964) which (she) was not eligible for because of age." (Tr. 1959-60.) Claimant's father also told her about an upcoming Trainee examination which she could not take because it was only for males. (Tr.1959, 1989-90.) She stated that she knew of the Trainee position and its duties from her father. (Tr. 1960-61.) In 1965, claimant went to the Department of Personnel with a male friend to inquire about the next Policewomen's examination. She was told to fill out a card for notification for the next Policewomen's examination, which she did. (Tr. 1961-2, 1974-5.)

Counsel for claimant contends that she would have been eligible to take either Examination No. 1115 for Trainee or Examination No. 1245 for Trainee. Both of those examinations had filing periods in 1964, which,based on claimant's testimony quoted above, was prior to the date she first took,or caused to be taken,overt action with respect to obtaining a position in the Police Department.

Accordingly, I find that the first examination for which she would have been eligible if it were not restricted to men was Examination No. 1557 for the position of Patrolman. That examination had filing dates of December 1, 1965 through February 25, 1966, and was given on March 12, 1966. The median appointment date from the resulting eligibles list was March 1, 1967. (Plaintiffs' Exh. 3, DPF 15, 16.)

If Examination No. 1557 for Patrolman had not been limited to men, claimant would have been eligible to take that examination, was, except as indicated below, otherwise eligible for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of March 1, 1967, which date, pursuant to the decision of Judge Duffy should be adjusted to March     , 1973.

## KATHLEEN DRISCOLL

KATHLEEN DRISCOLL was born on June 12, 1948, was appointed a Policewoman in The New York City Police Department on May 29, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 1995-7.) Claimant has never been married and has had no children. (Tr. 1996.) She received a high school diploma on June 25, 1965 and a driver's license in 1966. (Tr. 1997.)

Claimant first became interested in the Police Department in 1964 while at high school, when her brother took the examination for the Police Department. Her father and uncle were members of the Police Department and her brother was appointed in 1965. (Tr. 1997-8, 2019, 2025-7.) Claimant discussed her interest in a position in the Police Department, including the Trainee position, and specifically the eligibility, clerical and salary aspects of the Trainee job and its culmination in appointment as a Police Officer, with her father, brother and PATRICK SULLIVAN, a Police Department Sargeant who was a friend of her father. (Tr. 2001, 2039-40, 2049.)

Claimant requested both her father and Sargeant Sullivan to look for opportunities for claimant to come into the Police Department. (Tr. 2044, 2047-8, 2054.)

Defendants argue that claimant personally never made any overt inquiries at the Department of Personnel or the Police Department seeking employment as a Trainee or Police Officer until 1969 and that consequently her claim to an earlier seniority date must be denied. (DPF 19.)

However, Sargeant Sullivan testified that he was employed in the Personnel Bureau of The Police Department from 1965 on and that he was looking out for opportunities for her. Moreover, he testified that he discussed upcoming examinations and specifically the Trainee examinations with claimant directly and with her father. (Tr. 2047-8.) In view of the fact that the Personnel Bureau of the Police Department would be the first to know about examinations (Tr.2048), I find that there would not have been any point in claimant making additional inquiries herself.

Examination No. 1455 for the position of Trainee was given on March 12, 1966. The filing dates for that examination were from November 3, 1965 to November 30, 1965 and the median appointment date from the eligibles list resulting therefrom was November 7, 1966. (Plaintiffs' Exh. 3, Tr. 1994-5.)

If Examination No. 1455 for Trainee was not limited to men, claimant would have been eligible to take that examination, was otherwise eligible for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of November 7, 1966.

## GAETANA ROSENTHAL

GAETANA ROSENTHAL was born on December 27, 1946, was appointed a Policewoman in The New York City Police Department on August 31, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 2065-7.) Claimant was married on June 6, 1968, divorced in 1972 and has had no children. (Tr. 2068-69.) She received a high school diploma in 1965 and a driver's license in 1965. (Tr.2068.)

Claimant's testimony, viewed in a light most favorable to her, was that in 1965, her last year in high school, she expressed her interest in becoming a member of the Police Department to her friends; she had heard from friends and read about the Trainee position and its duties; in November, 1965 she heard from theatre co-employees about an upcoming Trainee test which they were planning to take and in which she was interested. (Tr. 2069-72, 2099-3000.) When she called the Department of Personnel, she was told that the test was for men only. (Tr. 2072-3.) Claimant's sister testified to the same effect. (Tr. 2106-8, 2110-1.)

Based upon the demeanor and testimony of claimant and her sister, I do not find it credible that claimant expressed a desire to become a Police Trainee in or about 1965 or that she took any overt action in furtherance of such desire.

Accordingly, I do not find that claimant sustained her burden of proof by a preponderance of the evidence sufficient to establish entitlement to a seniority date earlier than the one she now has.

## MARY O'SHEA

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MARY O'SHEA was born on May 4, 1941, was appointed a Policewoman in The New York City Police Department on August 31, 1973, was laid off on July 1, 1975, and has not been reinstated. (Tr. 2115-7, 2125.) Claimant has never married and has had no children. (Tr. 2116-7.) She received a high school diploma in June, 1959 and a driver's license in 1962. (Tr. 2116.)

Claimant maintains that she first took steps to join the Police Department on April 6, 1967, the day she was fired from her job with the New York Telephone Company, when she went to the 103rd Precinct looking for employment with the Police Department. (Tr. 2117-8, 2122, 2141.) She stated that she was told by the officer at the desk that no tests were being given and left her name and address for future notification. Her mother and brother testified that claimant told her of the incident. (Tr. 2149-50, 2155-7.) Claimant testified that she made no inquiries relating to a police career from that date in 1967 until she applied for the 1969 Policewomen's examination. (Tr. 2142.)

Based upon the demeanor and testimony of claimant, her mother and her brother, I do not find it credible that claimant inquired about a position in the Police Department in 1967 and took no further action until she took the Policewomen's examination in 1969.

Accordingly, I do not find that claimant sustained her burden of proof by a preponderance of the evidence sufficient to establish entitlement to a seniority date earlier than the one she now has.

## KATHERINE GILLIGAN

KATHERINE GILLIGAN was born on December 20, 1940, was appointed a Policewoman in The New York City Police Department on June 25, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 2178-9.) Claimant was married on June 30, 1962 and has three children who were born on April 16, 1963, January 11, 1967 and March 28, 1972. (Tr. 2179-2214.)

Claimant maintains that she first became interested in being a Police Officer as a child but that she did not take any steps in furtherance of that interest until the Summer of 1964, after her husband's decision to remain in New York. (Tr. 2180, 2194-8.) At that time, she called the Department of Personnel and was told that a Policewomen's examination had just been given. (Tr. 2180-1.) Her husband, however, testified that he did not decide to remain in New York until after he had taken a series of tests in early 1965. (Tr. 2226.) Her husband testified that he became aware of claimant's interest when she found out that there had been a Policewomen's test in 1964. (Tr. 2215.)

I do not find it credible that claimant who allegedly was interested in becoming a Policewoman since childhood, who had many members of her family in the Police

Department (Tr. 2186-8), and whose husband was a New York City Police Officer since 1963 (Tr.2185), did not know about the 1964 Policewomen's examination until after it had been given. Moreover, claimant's friend, GERALDINE ANDREWS testified that she and claimant both knew about the 1964 examination before it was given, and that they learned about it from claimant's husband. (Tr. 2239.) In addition, it should be noted that claimant was not employed from 1963 until her appointment to the Police Department in 1973, except for a two week temporary job in 1969. (Tr. 2206.)

Based upon the foregoing inconsistencies in the testimony of the claimant and her witnesses and upon the demeanor of all of them, I do not find their testimony in those respects and with respect to alleged calls to the Department of Personnel, the reading of The Chief and studying from Arco books to be credible. (Tr.2181-2, 2202-3, 2208, 2183-5, 2205-6, 2211, 2218, 2233-4.)

Accordingly, I find that claimant has not sustained her burden of establishing by credible evidence her entitlement to an earlier seniority date than the one she now has.

## MARIA E. GLANTON

MARIA E. GLANTON was born on March 10, 1946, was appointed a Policewoman in The New York City Police Department on April 30, 1973, was laid off on July 1,1975 and has not been reinstated. (Tr. 2245-6.) Claimant was married in April, 1967 and has one child who was born on January 21, 1968. (Tr. 2276, 2280.) She received a high school diploma in 1963 and a driver's license on September 30, 1965. (Tr. 2246.)

Claimant maintains that she first became interested in becoming a Police Officer in mid-1965 during a discussion with friends, including JOSEPH McQUILLAN and MARY BURKE, both of whom also testified. (Tr. 2247, 2293-4, 2504-5.) She stated that she frequented a bar where "several people were Police Officers or were into civil serve work" and that she expressed her interest to them. (Tr. 2247-8.)

Claimant further stated that she read The Chief between 1966-1969, but admitted that she did not see any examination for Patrolman during that same period. (Tr.2251-2.) Her husband testified that he made an inquiry for her at the Personnel Department at Thomas Street but could not recall when the inquiry was made. (Tr. 2290-1.) However, he also stated that he was interested in certain positions for himself. (Tr. 2286-9.)

Based upon the demeanor of claimant and all the witnesses who testified on her behalf and the substance of their testimony, I do not find their testimony to be credible. Consequently, claimant must be denied an earlier seniority date than the one she now has.

## HELEN KNEDLHANS

HELEN KNEDLHANS was born on July 29, 1944, was appointed a Policewoman in The New York City Police Department in February, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 2355-7.) Claimant has never married and has no children. (Tr. 2357.) She received a high school diploma in June, 1962 and a driver's license in 1970. (Tr. 2356-7.)

Claimant was interested in becoming a Policewoman since childhood. (Tr. 2357-8.) This interest continued through high school and thereafter. She collected and saved newspaper clippings about Policewomen and requested information about the Police Department from her school librarian and New York Life Insurance Company. (Tr. 2359-61.)

She attended nursing school from September, 1963 through June, 1966. During that time, she purchased and read the Policewomen's Arco Book and other books relating to police work. (Tr. 2377-8, 2399, 2379-80.) She was aware of the 1964 examination for Policewoman but did not take it because she was in nursing school. (Tr. 2374-5.)

Defendants argue that claimant would not have left her nursing career between 1966 and 1969 to take a job with the Police Department because she had a three year obligation to work at Lenox Hill Hospital in order to receive a substantial refund on her nursing school tuition. (DPF 13, 14.) However, I find that her testimony described above and her testimony and the testimony of a nursing school classmate that she would have accepted an appointment to the Police Department at any time after she had completed nursing school (Tr. 2389, 2423-4), coupled with the exhibits introduced on behalf of claimant (see e.g., KNEDLHANS Ex. 11A and B, 12A and B, 13A and B) outweigh the evidence that she received a substantial tuition refund because she worked at Lenox Hill Hospital for three years.

Examination No. 6069 for the position of Patrolman was given on October 22, 1966. The filing dates for that examination were August 3, 1966 through September 30, 1966 and the median appointment date from the eligibles list resulting therefrom was February 9, 1968. (Plaintiffs' Ex. 3, Tr. 2354.)

If Examination No. 6069 for Patrolman was not limited to men, claimant would have been eligible to take that examination, was, except as set forth below, otherwise eligible for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of February 9, 1968, which date, pursuant to the decision of Judge Duffy, should be adjusted to no earlier than the date she obtained her driver's license in 1970.

## MADELINE BEHETTE

MADELINE BEHETTE was born on July 19, 1941, was appointed a Policewoman in The New York City Police Department on July 30, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 2519-2520.) Claimant was married in 1956 and has three children who were born on June 24, 1957, August 11, 1958, and June 22, 1964. (Tr. 2529.) She graduated from high school in Damascus, Syria in June, 1956 and obtained a driver's license on February 16, 1972. (Tr. 2529-2531.)

Claimant first became interested in becoming a Police Officer in January, 1965, just after she assisted her husband, a Police Officer, in translating in connection with a complaint he was handling. (Tr. 2521.) She and a friend went to the 64th Precinct where claimant inquired about a test for Policewoman. She was told that none was forthcoming and she should read The Chief, which she did. (Tr. 2522-3, 2539-2541.) Thereafter, she assisted the Police Department by translating documents involved in Police Department work (Tr. 2523-4, 2538-9), and expressed her desire to become a Policewoman to several Policewomen, including now Lt. LUCY ACERRA. (Tr. 2526.)

Examination No. 1382 for the position of Patrolman was given on May 15, 1965. The filing dates for that examination were from January 18, 1965 to April 30, 1965 and the median appointment date from the eligibles list resulting therefrom was June 20, 1966. (Plaintiffs' Ex. 3, Tr. 2519.)

If Examination No. 1382 for Patrolman was not limited to men, claimant would have been eligible to take that examination, was, except as set forth below, otherwise eligible for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of June 20, 1966, which date, pursuant to the decision of Judge Duffy, should be adjusted to February 16, 1972.

## ARLENE EGAN

ARLENE EGAN was born on June 15, 1941, was appointed a Policewoman in The New York City Police Department on June 25, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 2572-3.) Claimant was married on October 15, 1960, separated in 1966, divorced in 1972 and has one child who was born on March 24, 1961. (Tr. 2574.) She received a high school diploma in June, 1959 and obtained a New York driver's license in 1961 or 1962. (Tr. 2573, 2594-5.)

Claimant testified that she first became interested in the Police Department in 1966 after having conversations with Police Officers ROBERT FRIES, WILLIAM McAULEY and LAWRENCE KENNEDY. She knew them from a White Castle where she was a waitress and the 8011 Club, where she was a cocktail waitress. (Tr. 2575-6.)

She further testified that she asked Police Officer FRIES to inquire about the Policewoman's examination for her. He testified that he made one phone call to the Department of Personnel for her and informed her that no tests were scheduled. (Tr. 2577, 2611-3.) Mr. FRIES told claimant to read The Chief, which she maintains she did. (Tr. 2611-2, 2577-8, 2598.)

Based upon the demeanor of claimant and her witness and the substance of their testimony, I do not find their testimony to be credible. Accordingly, I find that claimant is not entitled to an earlier seniority date than the one she now has.

## HELENE COHEN

HELENE COHEN was born on December 31, 1944, was appointed a Policewoman in The New York City Police Department on June 25, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 2684-5.) Claimant was married and divorced twice and has one child who was born on September 19, 1965. (Tr. 2686-7.) She received a high school diploma in 1962 and obtained a driver's license in 1970. (Tr. 2685-6.)

Claimant testified that she first became interested in becoming a Police Officer when she was 10 or 11 because she admired a Police Officer who lived in her building. (Tr. 2687-8.) Both she and the Police Officer testified about discussions relating to her interest in becoming a Police Officer. (Tr. 2767-8, 2733-4.)

She further asserts that in 1964 she called the Department of Personnel, went to the 69th Precinct, wrote to the Department of Personnel and received a response to her letter. (Tr. 2688-9, 2690, 2691, 2711-2, 2718.)

Claimant also testified that she called the Department of Personnel on October 23, 1966 from her mother's house and in the presence of her stepfather. She placed the date with precision because it was her mother's birthday. (Tr. 2691.) Her stepfather also placed the date of that call at October 23, 1966. (Tr. 2723, 2727.) Taking judicial notice of the fact that October 23, 1966 was a Sunday, I do not find this testimony credible.

Based upon the demeanor of the witnesses and the inconsistencies in their testimony (see e.g., TR. 2711-3, 2688, 2737, 2689-91), I do not find plaintiff's version of the events in 1964 and 1966 to be credible.

Accordingly, I find that plaintiff has not sustained her burden of establishing by credible evidence entitlement to a seniority date earlier than the one she now has.

## MICHAELE BARRY

MICHAELE BARRY was born on October 23, 1947, was appointed a Policewoman in The New York City Police Department on February 26, 1973, was laid off, on July 1, 1975 and has not been reinstated. (Tr. 2742-3.)

She graduated from high school in June, 1965 and obtained a driver's license in or about 1964. (Tr. 2742.)

Claimant testified that she wrote a letter to the City Civil Service Commission in 1964 or 1965 to inquire about the requirements for the position of Policewoman, but received no response. (Tr. 2766-8.) In January, 1966, she called the Civil Service Commission and asked about openings for Policewomen; she was told that there were no openings and that she should contact the Police Academy, which she did. (Tr. 2768-9.) Thereafter, claimant wrote to the Policewomen's Bureau requesting information concerning employment as a Policewoman. (Tr. 2770-1.) She received a mimeographed form response notifying her that there were no openings. (Tr. 2771-3.) Both claimant's father and a friend testified that they saw this response. (Tr. 2785-6, 2805-6.)

Claimant contends that she expressed a desire to become a Trainee in 1964 and thereafter, which would entitle her to a seniority date earlier than the one she now has. (See e.g., PPF 12, 14.) While I find that claimant expressed a desire to become a member of the Police Department, I do not find her testimony or her father's testimony with respect to the Trainee position to be credible. (See e.g., Tr. 2745-6, Tr. 2789-90.)

Examination No. 7065 for the position of Patrolman/ Trainee was given on May 11, 1968. The filing dates for that examination were from April 3, 1968 to April 23, 1968. The median appointment date for the Patrolman position from the eligibles list resulting therefrom was March 14, 1969. (Plaintiffs' Ex. 3, Tr. 2744.)

If Examination No.7065 for Patrolman was not limited to men, claimant would have been eligible to take that examination, was otherwise eligible for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of March 14, 1969.

## ISABEL HUGHES

ISABEL HUGHES was born on March 2, 1941, was appointed a Policewoman in The New York City Police Department on May 29, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 2825.) Claimant was married in April, 1960 and has four children who were born on July 24, 1959, April 17, 1960, February 3, 1962, and June 14, 1966. (Tr. 2825.) She received a high school diploma in May of 1959 and obtained a driver's license in May of 1967. (Tr. 2825 .)

Claimant testified that she first became interested in the Police Department in 1962 but did nothing about it until 1964 when she called the Department of Personnel and was informed that she was too late to file an application for the 1964 Policewomen's examination. (Tr. 2830.) Subsequently, she stated that she read The Chief and made other calls to the Department of Personnel, but she could not recall the dates of those calls. (Tr. 2833., 2863.)

It is undisputed that claimant obtained the application for her husband to take Examination No. 6069 for Patrolman in October, 1966. (Tr. 2834, 2878, DPF 11.)

Examination No. 6069 for the position of Patrolman was given on October 22, 1966. The filing dates for that examination were from August 3, 1966 to September 30, 1966, and the median appointment date from the eligibles list resulting therefrom was February 9, 1968. (Plaintiffs' Ex. 3, Tr. 2828 .)

If Examination No. 6069 for Patrolman was not limited to men, claimant would have been eligible to take that examination, was otherwise eligible for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of February 9, 1968.

## JULIA THOMPSON

JULIA THOMPSON was born on January 22, 1944, was appointed a Policewoman in The New York City Police Department on June 25, 1973, was laid off on July 1, 1975, and has not been reinstated. (Tr. 2910-11 .) Claimant was married in February, 1961, divorced in January, 1970 and has one child who was born in June, 1961. (Tr. 2910-11.) She received a high school equivalency diploma in October, 1964 and obtained a driver's license in 1964. (Tr. 2910-11.)

In early 1964, claimant expressed her interest in becoming a Police Officer to her sister, BERNADETTE CREGG, who erroneously told her that she would need a high school diploma to take an examination for appointment to the Police Department. (Tr. 2914-6 .) Relying on this information, claimant took the high school equivalency examination in June, 1964, and received a diploma in October, 1964. (Tr. 2914-6.)

After claimant received that diploma, her sister, who then worked in the Department of Personnel of the District Attorney's Office, called the City Department of Personnel at claimant's request and sent a self-addressed postcard to Personnel with claimant's name on it. (Tr. 2919-20, 2932.)

Claimant continued to express her interest in being a Police oficer to her sister and between 1965 and 1969 requested that her sister follow The Chief and the civil services flyers which came through her office, which she did. (Tr. 2919.) During the same time, claimant studied an Arco book to prepare for a Police Department examination. (Tr. 2918.)

Defendants argue that claimant personally never made any overt attempt to obtain employment with the Police Department. (DPF 19.) However, claimant's sister, because of her position, was able to obtain, quickly and easily or in the course of her duties, whatever information claimant would have been able to obtain by making her own inquiries. Moreover, claimant testified and her sister corroborated that claimant studied from an Arco book.

Under the circumstances, I find that defendants' argument is not sufficient to deny claimant entitlement to retroactive seniority.

Examination No. 9996, Group 3 for Patrolman was given on November 14, 1964. The filing period for that examination ended on October 31, 1964 and the median appointment date from the resulting eligible list was March 28, 1966.

If Examination No. 9996, Group 3 for Patrolman was not limited to men, claimant would have been eligible to take that examination, was otherwise eligible for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of March 28, 1966.

## DOLORES DORFMAN

DOLORES DORFMAN was born on July 26, 1945, was appointed a Policewoman in The New York City Police Department on July 30, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 2944-5.) Claimant was married in February, 1966 and has no children. (Tr. 2944.) She graduated from high school in June, 1963 and obtained a driver's license in 1969. (Tr. 2944.)

Claimant testified that in 1965 she called the Department of Personnel and asked if she could file for a Policewoman's examination. She stated that she was told that an examination had been held the prior year and that there were no examinations for women scheduled. (Tr. 2948.) She further stated that she left her name and address and requested that she be notified when the next examination was scheduled. (Tr. 2948. ) No one was present when that call was made. (Tr. 3005.)

Claimant's husband testified that his wife expressed her interest in being a Police Officer to him as early as 1965 and that he made inquiries to the Police Department about Policewomen's examinations, at claimant's request, between 1965 and 1969. (Tr. 3005-6.) Claimant's mother also testified that claimant expressed an interest in employment with the Police Department during this period of time. (Tr. 3033-6.)

Based upon my observation of claimant, and the witnesses who testifed on her behalf and in particular their demeanor on cross-examination, I do not find this testimony to be credible. However, claimant also testifed that she called the Department of Personnel in late 1967 or early 1968 to inquire about the next Policewoman's examination and was told"that they now believed there was going to be an exam the following year". (Tr.2963.) In addition, she stated that she then wrote a letter to the Department of Personnel requesting that she be placed on a list to be notified if a Policewoman's examination would be given. (Tr. 2964.) When the test was available for filing, she was notified. (Tr. 2963.) I find this testimony to be credible.

Defendants argue that in 1973 when claimant was first considered for appointment, she was not approved because she was underweight and that consequently she should not be granted an earlier seniority date. (DPF 24.) However, in view of the fact that this condition was wholly within claimant's control and was one which was promptly corrected, I find this condition does not preclude her from obtaining an earlier seniority date than the one she now has.

Examination No. 7065 for Patrolman/Trainee was given on May 11, 1968. The filing dates for that examination were April 3, 1968 to April 23, 1968 and the median appointment date for Patrolman from the eligibles list resulting therefrom was March 14, 1969.

If Examination No. 7065 for Patrolman/Trainee had not been limited to men, claimant would have been eligible to take that examination, was, except as indicated below, otherwise qualified for appointment to the Police Department and would have accepted appointment as a Patrolman.

Consequently, I find that claimant should be granted a seniority date of March 14, 1969, which date, pursuant to the Opinion of Judge Duffy, may have to be adjusted to a later date in 1969, if further investigation reveals that claimant did not receive her driver's license until after March 14, 1969.

## MAUREEN KIRWAN

MAUREEN KIRWAN was born on August 26, 1947, was appointed a Policewoman in The New York City Police Department on June 25, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 3051-2.) Claimant has never married and has no children. (Tr. 3051 .) She graduated from high school in June, 1965 and obtained a driver's license in 1966 prior to her 21st birthday. (Tr. 3051.)

Claimant was interested in a career in the Police Department since childhood. (Tr. 3054.) She indicated her interest in taking Examination No. 1215 for Trainee prior to the time her brother filed to take that examination. She was informed by her brother that the examination was only open to men. (Tr. 3055-7.)

Between 1965 and 1969, claimant's father, at her request, called the Department of Personnel requesting information about the next examination for the position of Policewoman and claimant and her father followed The Chief to see if any examinations for Policewoman were scheduled. (Tr. 3059-61.) In 1968, claimant called the Department of Personnel and was told that no examination for women was scheduled. (Tr. 3059.)

Examination No. 1215 for the position of Trainee was given on January 16, 1965. The filing dates for that examination were from November 4, 1964 to November 30, 1964 and the median appointment date from the eligibles list resulting therefrom was October 29, 1965. (Plaintiffs' Ex. 3, Tr. 3052.)

If Examination No. 1215 for Trainee was not limited to men, claimant would have been eligible to take that examination, was, except as indicated below, otherwise eligible for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of October 29, 1965, which date, pursuant to the decision of Judge Duffy, should be adjusted to a date in 1966, no earlier than the date on which she obtained her driver's license.

## CAROL SCHATZBERG

CAROL SCHATZBERG was born on April 19, 1945, was appointed a Policewoman in the New York City Police Department on October 29, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 3206, 3208.) Claimant has never been married and has no children. (Tr. 3208.) She graduated from high school in June, 1962 and obtained a driver's license on September 1, 1968. (Tr. 3207.)

Claimant has requested until the close of business, March 18, 1977, to submit a reply to defendants' proposed findings. I have granted that request and will submit a report with respect to that claimant during the week of March 21, 1977.

## PHYLLIS TABB

PHYLLIS TABB was born on October 28, 1944, was appointed a Policewoman in the New York City Police Department on March 26, 1973 and was laid off on June 30, 1975 and has not been reinstated. (Tr. 3266.) Claimant has never been married and has no children. (Tr. 3266.) She graduated from high school in 1962 and obtained a driver's license in 1963. (Tr.3267.)

Claimant testified that in 1964 she was aware that a Policewomen's examination was being given. She stated that she called the Department of Personnel and was told that she had to be 21 to take the test. (Tr. 3267.)

She further testified that she subsequently sent four green application cards to the Department of Personnel and each time received a typewritten response advising her that no examinations were scheduled and the card. (Tr. 3268, 3274.) She stated that she no longer has the responses. (Tr. 3068-9.) No witness testified on claimant's behalf.

Based upon the demeanor of the witness, both in the course of direct examination and cross-examination, I do not find it credible that she attempted to obtain employment in the Police Department from 1964 through 1967. However, claimant testified that she took a course in Spanish at night at Erasmus Hall High School because she thought it would help her working in the streets of New York when she would become a Police Officer. She also introduced documentary evidence of her attendance,as aforesaid. (Tr.3269.) She further stated that during the same year she was a volunteer at BELLEVUE HOSPITAL because she thought it might aid her later on in her work as a Police Officer. (Tr. 3269, 3273.)

I find claimant's testimony that she expressed her intention to become a Police Officer in 1968 and thereafter, to be credible.

Claimant, in her response to the defendants' proposed findings also points out that she attended DELEHANTY INSTITUTE on her own time and at her own expense in preparation for the Police Department examination. However, in view of the fact that claimant admitted that attendance at DELEHANTY was in 1969 in preparation for the examination she did take (Tr. 3273), I do not find that fact to be relevant to the issues presented in this matter.

Examination No. 8046 for Patrolman/Trainee was given on July 20, 1968. The filing period for that examination was in June, 1968 and the median appointment date for Patrolman from the eligibles list resulting therefrom was June 30, 1969. (Plaintiffs' Ex. 3, DPF 16.)

If Examination No. 8046 were not limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment and would have accepted appointment as Patrolman.

Consequently, I find that claimant should be granted a seniority date of June 30, 1969.

## WIVE MATHLESS

WIVE MATHLESS was born on October 13, 1941, was appointed a Policewoman in the New York City Police Department on December 17, 1973, was laid off on July 1, 1975, and has not been reinstated. (Tr. 3294.) Claimant was married on March 31, 1959 and has two children who were born on November 6, 1959 and July 31, 1961. (Tr. 3294.) She received a high school equivalency diploma in November, 1973 but had previously graduated from high school in Denmark. (Tr. 3294.) She obtained a driver's license in 1970. (Tr. 3294.)

Defendant's counsel have not yet prepared complete proposed findings with respect to the claimant. Pursuant to Judge Duffy's Opinion dated February 25, 1977, I find that claimant should not be granted a seniority date earlier than the one she now has. However, after receipt of defendants' proposed findings, I will issue a supplemental report with respect to this claimant which will contain an analysis of the evidence presented on her behalf.

## CAROL Di LORENZO

CAROL Di LORENZO was born on February 27, 1947, was appointed a Policewoman in The New York City Police Department on July 30, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 3512.) Claimant was married in March, 1966, was divorced in January, 1971 and has a child who was born on June 25, 1966. (Tr. 3512 .) She graduated from high school in January, 1964 and obtained a driver's license in September, 1964, prior to her 21st birthday. (Tr. 3512, 3514.)

Claimant testified that she learned about an examination for the position of Trainee in 1964 from two male friends who took that examination. She stated that she was interested in taking that examination but was informed by her friends that the examination was only for men. (Tr. 3514-6.)

She further stated that in the Summer of 1966, following the birth of her daughter, she called the Department of Personnel from her home and inquiried about an examination for Policewoman. No one else was present when she made the call. She was told that there was no information at that time and that she should watch the Civil

Service newspapers for an announcement. (Tr. 3516-7.) She then wrote a letter to The Chief which she stated she showed to her mother, father and sister. (Tr. 3517-8.)

Claimant's father and sister both testified about that telephone call and letter. Her father stated that he was present when the phone call was made to the Police Department from his house after he had come home from work. (Tr. 3555-6, 3558-9.) He also stated that she wrote the letter to The Chief at his house, right after she made the phone call. (Tr. 3560-1.) Claimant's sister testified that she was not present when the phone call was made but that she learned about it when she went to claimant's house the night the phone call had been made and that she saw her sister finish writing the letter. (Tr. 3571-3.)

Based upon the demeanor of claimant and her witnesses, and the inconsistencies in their testimony, I find that claimant has not sustained her burden of establishing by credible evidence her entitlement to an earlier seniority date than the one she now has.

## JOAN HOULIHAN

JOAN HOULIHAN was born on February 18, 1946, was appointed a Policewoman in The New York City Police Department on August 31, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 3645.) Claimant has never been married and has no children. (Tr. 3645.) She graduated from high school in June, 1963 and obtained a driver's license on August 1, 1973. (Tr. 3645.)

Defendants' counsel have not yet prepared complete findings with respect to this claimant. Pursuant to Judge Duffy's Opinion dated February 25, 1977, I find that claimant should not be granted a seniority date earlier than the one she now has. However, after receipt of defendants' proposed findings, I will issue a supplemental report with respect to this claimant which will contain an analysis of the evidence presented on her behalf.

## GINNY L. SCHNEIDER

GINNY L. SCHNEIDER was born on May 3, 1947, was appointed a Policewoman in The New York City Police Department in May 29, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 2.) Claimant was married in July, 1971, and has no children. (Tr. 2-3.) She graduated from high school in June, 1965 and obtained a driver's license in December, 1966. (Tr. 3.)

Claimant testified that in approximately January of 1966, while a student at Queens College, she met Sargeant O'Reilly of the New York City Police Department and discussed employment with the Police Department. She was able to place the date because it was shortly after she started attending college in September, 1965. (Tr. 3-4 .)

Sargeant O'Reilly confirmed the conversation and stated that he advised her to call the Department of Personnel. He was able to place the date of the first conversation because it was shortly after he was transferred to the 107th Precinct in November, 1975. (Tr. 39-42.)

Claimant also testified that pursuant to Sargeant O'Reilly's suggestion, she called the Department of Personnel to inquire about the position of Policewoman. She left her name and was told that she would be notified about the next examination for Policewomen. She learned about the Policewomen's examination she took in 1969 from the Department of Personnel. (Tr.4-6.)

In addition, claimant stated that between 1966 and 1969 she called Personnel every few months to find out if any examinations for women had been scheduled and frequently discussed her interest in the Police Department and her calls to Personnel with Sargeant O'Reilly. (Tr. 5-7.)

Defendants assert that claimant is not entitled to an earlier seniority date than the one she now has because she would not have left college to accept a position with the Police Department and because she was overweight until September, 1969. (DPF 9, 13.) In view of the fact that claimant accepted appointment as a Policewoman even after graduation from college, I do not find her attendance at college inconsistent with her expressed desire to become a Police Officer. Nor do I consider the fact that claimant was overweight until September, 1969, to be an absolute bar to an earlier seniority date. The loss of weight was a matter completely within claimant's control and was under control prior to the date she took the examination which resulted in her appointment.

Examination No. 6127 for the position of Patrolman/Trainee was given on April 1, 1967. It was a walk-in examination and the median appointment date for Patrolman from the eligibles list resulting therefrom was June 7, 1968. (Plaintiffs' Ex. 3, DPF 16.)

If Examination No. 6127 for Patrolman/Trainee was not limited to men, claimant would have been eligible to take that examination, was, except as set forth below, otherwise eligible for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of June 7, 1968, or in the alternative, an adjusted seniority date no later than the last day of September, 1969, the date when her overweight condition had ended.

## MARGO WOMACK

MARGO WOMACK was born on January 31, 1941, was appointed a Policewoman in The New York City Police Department on July 30, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 14-15.) Claimant was married in June of 1960 and has no children. (Tr. 15.) She graduated from high school in January, 1959 and obtained a driver's license in 1960. (Tr. 15.)

Claimant maintains that in 1964 she learned from a friend, MALCOLM HAMM, that she had missed a recent Policewomen's examination and thereafter called the Department of Personnel to inquire about examinations for Policewomen. (Tr. 17-8.) Her mother and sister testified to the same effect. (Tr. 48, 58-9.) A friend, EDITH CUNNINGHAM, who is also a laid off Police Officer, stated that claimant had indicated her interest in joining the Police Department as early as 1964 and that the claimant had told her, in or about 1964, that she had missed a recent Policewomen's examination. (Tr. 79.)

Claimant further stated that she watched The Chief and the Leader between 1964 and 1969, looking for information about Policewomen's examinations and her sister and friend testified that they saw her doing so. (Tr.19-21,59-60,81.) She also claimed to have called the Department of Personnel approximately twice between 1964 and 1969 to find out if any examinations for Policewomen were scheduled and her friend stated that she had discussed those calls with her. (Tr. 19-21, 80.)

Finally, claimant stated that after her half-brother took and failed the Patrolmen's examination in 1968, she discussed it with him and purchased an Arco book to prepare for the next Policewomen's examination. (Tr. 22-3.)

If the above-mentioned testimony were credible, it would be sufficient to sustain plaintiff's burden of establishing her entitlement to an earlier seniority date than the one she now has. However, there were many inconsistencies in the testimony of claimant and her witnesses and while the witnesses had clear recollections of the specific events they testified to on direct examination, their testimony on other matters which occurred at or about the same period of time was vague and inconsistent. For example, all the witnesses remembered the conversation with MALCOLM HAMM in 1964 but could not remember where claimant was residing in 1964, when or how many times she became pregnant and miscarried, and when her husband took ill.

Based on the foregoing and the demeanor of claimant and her witnesses, I do not find their testimony credible. Accordingly, claimant has not sustained her burden of establishing by credible evidence her entitlement to an earlier seniority date than the one she now has.

## MARGARET M. De JACQUANT

MARGARET M. De JACQUANT was born on August 2, 1948, was appointed a Policewoman in The New York City Police Department on August 31, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 53.) Claimant was married on November 9, 1974 and has no children. (Tr. 53.) She graduated from THORPE SECRETARIAL SCHOOL in June of 1966, obtained a high school equivalency diploma in April, 1976, and a driver's license in approximately 1965. (Tr. 53-4.)

In approximately April or May, 1967, claimant called the 19th Precinct to inquire about filing an application for appointment to the Police Department. She was told to contact the Department of Personnel, which she did and asked about the positions of Policewoman and Police Trainee. She was told that the Trainee position was for men only and that an examination for Policewomen would be scheduled soon. (Tr. 60-61.) Claimant left her name and asked to be notified when the examination was scheduled. (Tr. 62.) Claimant's mother was present when those calls were made and testified as to their substance. Claimant's Aunt testified as to the substance of those calls as related to her by claimant. (Tr. 92-4, 108-10.)

Claimant further testified that she bought The Chief regularly between 1966 and 1969, looking for an examination for Policewoman and in approximately the Summer of 1968 again called Personnel and asked for an application for a Policewoman's examination. She stated that she was again told that an examination for women would soon be scheduled and that she would be notified about such an examination. (Tr. 62.)

Examination No. 7017 for Patrolman/Trainee was given on June 3, 1967. It was a walk-in examination and the median appointment date for Trainee from the eligibles list resulting therefrom, was January 29, 1968. (Plaintiffs' Ex. 3, DPF 16.)

If Examination No. 7017 for Patrolman/Trainee was not limited to men, claimant would have been eligible to take that examination, was, except as set forth below, otherwise eligible for appointment and would have accepted appointment as Trainee.

Consequently, I find that claimant should be granted a seniority date of January 29, 1968, which date, pursuant to the decision of Judge Duffy, should be adjusted to August 31, 1973, the date of her actual appointment to the Police Department.

## CAROLE BYRD

CAROLE BYRD was born on December 2, 1948, was appointed a Policewoman in the New York City Police Department on October 1, 1973, was laid off on June 30, 1975 and has not been reinstated. (Tr. 61-2.) Claimant was married on February 4, 1968, was separated from her husband in January, 1974, and has two children born July 23, 1968 and May 10, 1970. (Tr. 62-3.) She graduated from high school in 1967 and obtained a driver's license in May, 1970. (Tr. 62.)

Claimant testified that after graduation from high school she called the Department of Personnel to inquire about a position as a Policewoman. No one was present when she made the call. (Tr. 67-8.) Claimant and her Uncle both testified that claimant expressed an interest in becoming a Police Officer and that they discussed that interest. (Tr. 63,85-6.) There was no testimony about an interest in the Trainee position.

Examination No. 8108 for Patrolman/Trainee was given on January 18, 1969. The filing dates for that examination were November 25, 1968 to January 6, 1969 and the median appointment for Patrolman from the eligible list resulting therefrom was January 29, 1973. (Plaintiff's Ex. 3, DPF 16.)

If Examination No. 8108 for Patrolman/Trainee was not limited to men, claimant would have been eligible to take that examination, was otherwise eligible for appointment and would have accepted appointment as a Patrolman.

Consequently, I find that claimant should be granted a seniority date of January 29, 1973.

## EVERLINA WALKER

EVERLINA WALKER was born on March 9, 1947, was appointed a Policewoman in the New York City Police Department on December 17, 1973, was laid off on June 30, 1975 and has not been reinstated. (Tr. 93.) Claimant obtained a high school equivalency diploma in December, 1972 and a driver's license in April, 1973. (Tr. 94.) She has never been married and has two children, born July 22, 1962 and March 8, 1966. (Tr. 94-5.)

In view of the fact that claimant and KATHRYN GUINN, the witness who testified on her behalf, recanted their admittedly perjurious testimony (Tr.131-5), I find their testimony not to be credible. Consequently, I find that claimant has failed to sustain her burden of establishing by credible evidence her entitlement to an earlier seniority date than the one she now has.

## KATHRYN GUINN

KATHRYN GUINN was born on May 10, 1945, was appointed a Policewoman in the New York City Police Department on December 17, 1973, was laid off on June 30, 1975 and has not been reinstated. (Tr. 120.) Claimant obtained a high school diploma in May, 1963 and a driver's license in September, 1968. (Tr. 120-1.) She has not been married and has one child who is 10 months old. (Tr. 120-1 .)

In view of the fact that claimant and EVERLINA WALKER, the witness who testified on her behalf, recanted their admittedly perjurious testimony (Tr.131-5), I find their testimony not to be credible. Consequently, I find that claimant has failed to sustain her burden of establishing by credible evidence her entitlement to an ealier seniority date than the one she now has.

## KATHLEEN HOLMES

KATHLEEN HOLMES was born on February 5, 1942, was appointed a Policewoman in the New York City Police Department on May 29, 1973, was laid off on July 1, 1975 and has not been reinstated. (Tr. 121-2.) Claimant married in November, 1961 and has three children who were born on August 20, 1962, August 7, 1963 and November 30, 1968. (Tr. 122.) She graduated from high school in 1959 and obtained a driver's license in approximately 1960. (Tr. 122.)

Claimant testified that in late 1964 she called the New York City Department of Personnel and inquired about an examination for Policewoman but was informed that a test for Policewoman had recently been given and that applications for women were not being accepted at the time. (Tr.123-4.) She also testified that at about the same time she called the Nassau and Suffolk County Police Departments to inquire about examinations for Policewomen and for the next several years tried to become a member of the Nassau County police force. (Tr. 129-131, 151-4.) No witnesses testified on behalf of claimant.

In January, 1968, claimant sent a letter to the New York City Department of Personnel requesting an application for "Policewoman" and asking for "any available information about this position." The letter was returned to her, stamped "Department of Personnel, January 12, 1968" and "not open" in an envelope postmarked January 12, 1968. (HOLMES Ex. 1A and 1B.) Claimant testified that she completed the enclosed card requesting an application and returned it to Personnel. (Tr. 126-8.)

Examination No. 7065 for the position of Patrolman/Trainee was given on May 11, 1968. The filing period for that examination was from April 3, 1968 to April 23, 1968 and the median appointment date for Patrolman from the eligibles list resulting therefrom was March 14, 1969. (Plaintiffs' Ex. 3, PPF 11, 13.)

If Examination No. 7065 for Patrolman/Trainee was not limited to men, claimant would have been eligible to take that examination, was otherwise eligible for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of March 14, 1969.

## CONCLUSION

The claims of the following should be allowed to the extent indicated above.

LOUISE SIMONELLI
BERALDINE L. ACHA
PATRICIA ANN COLLINS
GLORIA OEST
KATHLEEN DRISCOLL
HELEN KNEDLHANS
MADELINE BEHETTE
MICHAELE BARRY
ISABEL HUGHES
JULIA THOMPSON
DOLORES DORFMAN
MAUREEN KIRWAN
PHYLLIS TABB
GINNY L. SCHNEIDER
MARGARET M. De JACQUANT
CAROLE BYRD
KATHLEEN HOLMES

The claims of the following should be denied for the reasons set forth above.

GAETANA ROSENTHAL
MARY O'SHEA
KATHERINE GILLIGAN
MARIA E. GLANTON
ARLENE EGAN
HELENE COHEN
WIVE MATHLESS
CAROL DI LORENZO
MARY ELLEN THORNTON
JOAN HOULIHAN
MARGO WOMACK
EVERLINA WALKER
KATHRYN GUINN

The claim of CAROL SCHATZBERG will be determined on a subsequent date.

Dated: New York, New York
March 18, 1977

Respectfully submitted,
Renee J. Roberts
RENEE J. ROBERTS
Special Master

Order and Judgment of Hon. Kevin T. Duffy,
Mar. 25, 1977

U.S. DISTRICT COURT
FILED
MAR 25 1977
S.D. OF N.Y.

77 MAR 21 P 4:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------------x

BERALDINE L. ACHA and ARLENE M. EGAN, each individually and on behalf of all others similarly situated

Plaintiffs,

-against-

ABRAHAM D. BEAME, individually and in capacity as Mayor of the City of New York, MICHAEL J. CODD, individually and in his capacity as Police Commissioner of the New York City Police Department, and THE CITY OF NEW YORK, as a public employer

Defendants.

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## ORDER AND JUDGMENT

75 Civ. 3128
(KTD)

The plaintiffs, Beraldine Acha and Arlene M. Egan, each individually and on behalf of all others similarly situated, having moved this Court:

1. for an order pursuant to Rules 6(d) and 53(e)(2) of the Federal Rules of Civil Procedure adopting the Findings of the Special Master dated and filed herein on January 17, 1977, and March 18, 1977 (as amended by letter of March 24, 1977) (hereinafter "the Findings of the Special Master") that certain named members of the class of plaintiffs have established, by a preponderance of the evidence their entitlement to revised seniority dates [hereinafter referred to as "plaintiffs' motion (1)"];

2. for an order pursuant to Rules 6(d) and 53(e)(2) of the Federal Rules of Civil Procedure adopting the Findings of

the Special Master that plaintiff Marjorie Hogarth is entitled to a seniority date no later than July 9, 1965, subject to a subsequent determination by the Special Master of the contention of the defendants that plaintiff Marjorie Hogarth waived her entitlement to such a seniority date when she was reinstated to the New York City Police Department (hereinafter "the PD") in 1974 [hereinafter referred to as "plaintiffs' motion (2)"];

3. for an order pursuant to Rules 6(d) and 53(e)(2) of the Federal Rules of Civil Procedure adopting the Findings of the Special Master that plaintiff Francine Kripinski is entitled to a seniority date no later than March 14, 1969, subject to a subsequent determination by the Special Master of the contention of the defendants that said plaintiff was not entitled to an adjusted seniority status on the grounds that she was a probationary employee at the time of her layoff [hereinafter referred to as "plaintiffs' motion (3)"];

4. for an order pursuant to Rules 6(d) and 53(e)(2) of the Federal Rules for Civil Procedure sustaining the objections of the plaintiffs herein to the Findings of the Special Master that certain named members of the class of plaintiffs have not established, by a preponderance of the evidence, their entitlement to revised seniority dates, which objections were filed herein on January 27, 1977, and March 21, 1977 [hereinafter referred to as "plaintiffs' motion (4)"];

5. for an order pursuant to Rules 6(d) and 53(e)(2) of the Federal Rules of Civil Procedure that each of the following

members of the class of plaintiffs herein is entitled to a revised seniority date, as indicated below, or to a revised seniority date no later than June 30, 1969, or, in the alternative, that the claims of these plaintiffs be referred back to the Special Master for additional findings consistent with the order of this Court:

| Plaintiff | Revised Seniority Date |
|---|---|
| Gloria [illegible] | March 1, 1967 |
| Joann Catanese | July 15, 1964 |
| Patricia D'Esposito | June 20, 1966 |
| Maria T. Guardino | February 9, 1968 |
| Barbara Leahy | November 7, 1966 |
| Patricia Nielson | September 26, 1966 |
| Kathleen Sarro | March 1, 1967 |
| Gaetana Rosenthal | November 7, 1966 |
| Mary O'Shea | July 1, 1968 |
| Marie Glanton | July 1, 1968 |
| Katherine Gilligan | March 28, 1966 |
| Arlene Egan | April 3, 1968 |
| Helene Cohen | December 20, 1965 |
| Carol DiLorenzo | July 15, 1964 |
| Margo Womack | March 28, 1966 |

[hereinafter referred to as "plaintiffs' motion (5)"];

6. for an order pursuant to 42 U.S.C. §2000e-5(g) that all of the members of the class of plaintiffs named by plaintiffs in the motions herein be reinstated to their positions as Police Officers in the PD, with retroactive seniority for all pur-

poses, including back pay in an amount hereafter to be determined [hereinafter referred to as "plaintiffs' motion (6)];

7. for an order pursuant to 42 U.S.C. §2000e-5(g) directing and ordering the defendants to permit and allow all the members of the class of plaintiffs to take and participate in any make-up promotional examinations given or administered by the defendants for the position of Sergeant in the PD upon such terms and conditions as this Court may impose and direct [hereinafter referred to as "plaintiffs' motion (7)"]; and

8. for such other and further relief as to this Court may seem just and proper [hereinafter referred to as "plaintiffs' motion (8)"];

and the defendants having cross-moved for an order pursuant to Rules 6(2) and 53 of the Federal Rules of Civil Procedure:

1. sustaining defendants' general and specific objections to the Findings of the Special Master dated January 17, (1.) 1977, and March 18, 1977 (as amended by letter of March 24, 1977), vacating the findings of the Special Master and denying plaintiffs' claims in accordance with such objections [hereinafter referred to as "defendants' motion (1)"]; and

2. adopting the Findings of the Special Master as to plaintiffs Catanese, D'Esposito, Guardino, Leahy, Nielson, Sarro, Rosenthal, O'Shea, Glanton, Gilligan, Egan, Cohen, DiLorenzo and Womack [hereinafter referred to as "defendants' motion (2)"].

NOW, upon reading and filing the plaintiffs' notices of (17) motions filed February 1, 1977 (and March 21, 1977), the plaintiffs' objections to the Findings of the Special Master filed January 27, 1977, and March 21, 1977, and the Memorandum of Law and Reply Memorandum of Law of plaintiffs, all in support of the motion; the defendants' notices of cross-motion dated February 8, 1977 and March 23, 1977, the defendants' objections to the Findings of the Special Master, filed January 28, 1977 and March 23, 1977, and the defendants' Memorand~~um~~a of Law all in opposition to plainitffs' motion and in support of the cross-motion; the transcript of the hearings and proceedings before the Special Master, together with the exhibits submitted therein; the Findings of the Special Master filed January 17, 1977, and March 18, 1977 as amended by letter of March 24, 1977; the transcript of the testimony before this Court on February 16, 1977; and upon all the papers and proceedings heretofore had herein; and upon hearing the argument of Murray A. Gordon, P. C., counsel for plaintiffs, by Murray A. Gordon, Esq., in support of the aforesaid motion of plaintiffs and W. Bernard Richland, Esq., Corporation Counsel of the City of New York, counsel for the defendants, by Judith Levitt, Esq., in opposition to the motion and in support of the cross-motion; and due deliberation having been had thereon; and upon the decision and opinion of this Court, dated and filed February 25, 1977,

; it is, upon the motion of Murray A. Gordon, P. C., attorneys for plainitffs

ORDERED that the plaintiffs' motions (1), (6), (7) and (8) be and the same are hereby granted to the extent hereinafter indicated and the findings of the Special Master with respect thereto be and the same are hereby adopted; and it is further

ORDERED that plaintiffs' motions (4) and (5) be and the same are hereby denied; and it is further

ORDERED that the plaintiffs' motions (2) and (3) be and the same hereby are deferred for future determination; and it is further

ORDERED that the defendants' cross-motions are and the same are hereby granted to the extent hereinafter indicated; and it is further

ORDERED AND ADJUDGED that the lay-offs on or after June 30, 1975 of the members of the class named in plaintiffs' motion (1) from their employment in the Police Department other than Gloria Cost, Kathleen Fogarty, Clara A. Palumbo, Donna Cadwell, Beraldine Acha, Helen Knedlhans, and Madelaine Behette, solely for fiscal reasons, were unlawful and improper in that said members, except for their sex, would have been hired early enough to have accumulated sufficient seniority to withstand such lay-offs, and it is further

ORDERED, ADJUDGED AND DECREED that the lay-offs on or after June 30, 1975 of the members of the class named in plaintiffs' motion (4) and (5), from their employment in the Police Department, solely for fiscal reasons, were not unlawful or improper, and judgment shall be and the same is hereby entered against said class members named in plaintiffs' motion (4) and (5) and in favor of the defendants dismissing the complaint on the merits with respect to said class members; and if is further

(11) ORDERED AND ADJUDGED that the lay-offs on or after June 30, 1975 of class members Gloria Cest, Carol Byrd, Kathleen Fogarty, Clara A. Palumbo, Donna Cadwell, Beraldine Acha; Helen Knedlhans, and Madelaine Behette from their employment in the Police Department, solely for fiscal reasons, was not unlawful or improper, and the seniority dates of the said class members shall be and the same are hereby adjusted as hereinafter provided; and it is further

ORDERED, ADJUDGED AND DECREED that the seniority dates and status of the following 21 members of the class of plaintiffs (hereinafter "the 21 class members") shall be and same are hereby amended to, revised to and fixed at new seniority dates (hereinafter "the revised seniority dates") as follows:

| Name | Revised seniority dates |
|---|---|
| Patricia Boyce | August 1, 1966 |
| Joyce Fasce | August 1, 1966 |
| Maria Zolfo | August 1, 1966 |
| Bernadette Fowler | March 1, 1967 |
| Kathleen Casano | June 23, 1967 |
| Patricia Minore | April 3, 1968 |
| Gail Peterson | August 30, 1968 |
| Maureen Kempton | March 14, 1969 |
| Carol Grace | June 30, 1969 |
| Catherine DeLaRionda | January 30, 1970 |
| Louise Simonelli | January 29, 1968 |
| Patricia Collins | February 9, 1968 |
| Kathleen Driscoll | November 7, 1966 |

| | |
|---|---|
| Michaele Barry | March 14, 1969 |
| Isabel Hughes | February 9, 1968 |
| Julia Thompson | March 28, 1966 |
| Maureen Kirwan | October 29, 1965 |
| Ginny Schneider | June 7, 1968 |
| Kathleen Holmes | March 14, 1969 |
| Phyllis Tabb | June 30, 1969 |
| Margaret DeJacquant | January 29, 1968; |

and it is further

ORDERED, ADJUDGED AND DECREED that the seniority status and dates of the following 13 ~~12~~ members of the class of plaintiffs' (hereinafter "the 13 ~~12~~ class members") shall be and the same are hereby amended to, revised to, and fixed at revised seniority dates as follows:

| Name | Revised seniority dates |
|---|---|
| Carol Byrd | January 29, 1973 |
| Donna Cadwell | January 29, 1973 |
| Barbara Yanetti | June 30, 1969 |
| Mary Delores Lenihan | February 8, 1970 |
| Clara A. Palumbo | January 29, 1973 |
| Olivia Amorison | October 24, 1969 |
| Eleanore Hurson | June 30, 1969 |
| Kathleen Fogarty | April 30, 1973 |
| Beraldine Acha | September 20, 1971 |
| Gloria Oest | March 26, 1973 |
| Helen Knedlhans | January 29, 1973 |
| Madelaine Behette | January 29, 1973 |
| Dolores Dorfman | February 8, 1970; |

and it is further

ORDERED, ADJUDGED AND DECREED that the defendants be and the same are hereby directed and ordered to amend, revise, and fix the seniority dates and status of each of the 21 class members, and the ~~18~~ 13 class member's their respective revised seniority dates as hereinbefore provided, said revised seniority dates to govern all applicable current and future terms, conditions, benefits and fringe benefits of employment of said class members, including but not limited to current rate of compensation and subsequent incremental increases, future promotional opportunities, retention, future reinstatement, demotion, lay off, and benefits, and current working conditions such as assignment, transfer and vacation selection as may be affected by or conditioned upon seniority, provided, however, the right or entitlement, if any, of any of the aforesaid members of the class to displace or "bump" a present incumbent and/or to back pay and/or to retroactive pension contributions into the Police Pension Fund shall be deferred for future determination or resolution; and it is further

ORDERED, ADJUDGED AND DECREED that the letter of agreement of February 18, 1977, a copy of which is attached hereto, shall be and the same is hereby incorporated herein by reference, and the defendants shall be and the same are hereby ordered and directed to comply with all the terms and conditions of said letter agreement; and it is further

ORDERED, ADJUDGED AND DECREED that defendants be and same are hereby directed to apply the seniority dates, as herein adjusted, of plainitffs Clara A. Palumbo, Donna Cadwell, Helen Knedlhans, and Madelaine Behette, whose status with respect to re-employment by the Police Department is not provided for in the letter of agreement of February 18, 1977, incorporated herein by reference, in the offering of provisional appointments under the current grant funded by the Comprehensive Education and Training Act (CETA), and that said plaintiffs shall be offered and appointed to such provisional positions, on March 31, 1977 in the cases of Clara A. Palumbo and Donna Cadwell, Carol Bund Helen Knedlhans and Madelaine Behette; ~~and on April 11,~~ 1~~977, in the case of Helen Knedlhans and Madelaine Behette~~, provided, however, they are qualified under the conditions of the said grant on that date; and it is further

ORDERED AND DECREED that the defendants be and the same are hereby enjoined from further rehiring of any police officers from a seniority roster which does not reflect the proper seniority status of the 21 class members and the ~~11~~ 13 class members; and it is further

ORDERED AND DECREED that the defendants and/or their agents, servants, officers and/or employees permit and allow all members of the class of plaintiffs to take, to participate, and to be rated on a conditional basis in a make-up examination, tentatively schedueld to be given or administered by the defendants and/or their agents, servants, officers and/or employees on or about

May 21, 1977, or any adjourned date thereof for the position of Sergeant in the PD, provided that promotion of any class member as a result of said makeup examination shall be conditional upon the entitlement of that class member to a revised seniority date and timely reinstatement to the PD; and it is further

ORDERED that all other aspects of the relief sought by plaintiffs not herein or previously disposed of shall be and the same are hereby deferred for future resolution or determination.

Kevin Thomas Duffy
KEVIN T. DUFFY
U.S.D.J.

Dated: March 25, 1977
New York, New York

JUDGMENT ENTERED - 3/[illegible]/77

Raymond F. Burghardt
Clerk

City of New York
NEW YORK, N.Y. 10038

February 18, 1977

Hon. Kevin T. Duffy, Judge
United States District Court
For the Southern District
Foley Square
New York, New York 10007

RE: Acha, et al. v. Beame, et al.

Honorable Judge Duffy:

Pursuant to your directions at the hearing of February 16, 1977, counsel for the plaintiffs and defendants have discussed and reached an agreement on the matter of implementing the reinstatement of those members of the class in this action whose cases have been heard by February 25, 1977, and determined by the Special Master by March 4, 1977, and who establish, by decision of this court on or before March 15, 1977, entitlement to an adjusted seniority date of April 1, 1971 or earlier. (These women are hereinafter referred to as "successful plaintiffs"). The date of April 1, 1971 is used because it is the earliest seniority date of any of the police officers who were laid off for fiscal reasons and not reinstated in July, 1975.

The substance of the agreement is as follows:

1. Those successful plaintiffs who (a) declined appointment to Anti-Crime Experiment ("ACE") funded positions in August 1976, or (b) resigned from ACE funded positions in or after August 1976, will be offered permanent tax revenue funded police officer positions (hereinafter "permanent positions") not later than on or about March 31, 1977.

2. Those successful plaintiffs who accepted appointment to ACE funded positions in August 1976, will be continued in such positions until the expiration of ACE grant funds, and will be appointed to permanent positions upon the expiration of such ACE grant funding.

3. All other successful plaintiffs who qualify for appointment to Comprehensive Employment Training Act ("CETA") funded police officer positions will be appointed to such positions not later than on or about March 17, 1977, and will

be appointed to permanent positions upon the expiration of such CETA funding.

4. Before on or about March 31, 1977, all the remaining successful plaintiffs will be offered appointment to ~~pe~~ permanent police officer positions irrespective of the sufficiency of tax revenue funds presently committed for the retention of provisional police officers currently employed on expiring federal grants.

5. All successful plaintiffs will at all times referred to herein be entitled to the rights of tenured police officers. All successful plaintiffs referred to herein will be required to meet the same qualifications for appointment as any other persons appointed to the same position, it being understood that such qualifications shall not include conditions not cause for dismissal or retirement by the Police Department.

6. It is understood that the status of the successful plaintiffs may be affected by future appeals by either party in captioned case.

The consent of the plaintiffs and defendants to the terms hereof is indicated by the endorsement at the foot of this letter under the words "Consented To".

Respectfully submitted

LORENZO CASANOVA
Deputy Commissioner
Legal Mat[illegible]

LC:kl

Consented To:

W. BERNARD RICHLAND, ESQ.,
Corporation Counsel of the City of New York
Attorneys for defendants

By: Judith

Murray A. Gordon, Plaintiff's counsel

By:

# Notice of Motion to Renew Defendants' Cross Motion for Summary Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------x

BERALDINE L. ACHA and ARLENE M.
EGAN, each individually and on behalf
of all others similarly situated,

Plaintiffs,

-against-

ABRAHAM D. BEAME, individually and in
his capacity as Mayor of the City of
New York, MICHAEL J. CODD, individually
and in his capacity as Police Commissioner of the New York City Police
Department, and THE CITY OF NEW YORK,
as a public employer,

Defendants.

---------------------------------------x

NOTICE OF MOTION
TO RENEW DEFENDANTS'
CROSS-MOTION

75 Civ. 3128
(KTD)

PLEASE TAKE NOTICE that upon the annexed affidavits of JUDITH A. LEVITT, Assistant Corporation Counsel, and MICHAEL J. CODD, Commissioner of the New York City Police Department, defendants hereby move this Court pursuant to Rules 56 and 60 of the Federal Rules of Civil Procedure to renew their cross-motion for summary judgment, which was denied by this Court by opinion and order dated July 16, 1976 and to relieve defendants from the order and judgment entered thereon on August 4, 1976 and from all subsequent orders and/or judgments entered herein on the grounds that intervening decisions of the United States Supreme Court are controlling on the issues presented in this case and in defendants' prior cross-motion for summary judgment and require that judgment be granted in favor of defendants.

PLEASE TAKE FURTHER NOTICE that pending determination of the instant application defendants' request that this Court stay all further hearings before the Special Master on the grounds that to continue such hearings would create undue expense and hardship to both parties in view of the likely event that defendants' motion will be granted.

Defendants further request, in the event the within motion is granted, reasonable time thereafter to move before this Court for recoupment of all interim attorneys' fees and disbursements and Special Master's fees and disbursements heretofore paid by defendants.

Yours, etc.

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendants
Office and P. O. Address:
Municipal Building
New York, N. Y. 10007
(212) 566-8390/2192

TO: MURRAY A. GORDON, P.C.
Attorney for Plaintiffs
666 Third Avenue
New York, N. Y.

Dated: New York, N. Y.

June 15, 1977

Affidavit of Judith A. Levitt in support of Defendants' Motion to renew Cross-motion for summary judgment

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
-----------------------------------------x

BERALDINE L. ACHA and ARLENE M. EGAN, each individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

ABRAHAM D. BEAME, individually and in his capacity as Mayor of the City of New York, MICHAEL J. CODD, individually and in his capacity as Police Commissioner of the New York City Police Department, and THE CITY OF NEW YORK, as a public employer,

Defendants.

-----------------------------------------x

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION PURSUANT TO RULES 56 AND 60 OF THE FRCP

76 Civ. 3128 (KTD)

STATE OF NEW YORK )
: SS.:
COUNTY OF NEW YORK )

JUDITH A. LEVITT, being duly sworn, deposes and says:

1. I am an assistant in the office of W. BERNARD RICHLAND, Corporation Counsel, attorney for defendants herein, and am therefore fully familiar with the facts in this action. I submit this affidavit in support of defendants' motion to renew their prior cross-motion for summary judgment which was denied by opinion and order dated July 16, 1976.

2. On June 8, 1977, a conference was held before the Honorable Kevin T. Duffy, United States District Judge, upon request of the defendants. At that time, defendants advised the Court that they would be submitting the instant motion within a week therefrom and requested a stay of further hearings before the Special Master pending the

determination of the motion to renew in view of the recent Supreme Court decisions in International Brotherhood of Teamsters v. United States, 45 U.S.L.W. 4506 (May 31, 1977) and United Air Lines v. Evans, 45 U.S.L.W. 4566 (May 31, 1977).

3. During the course of the conference, Murray A. Gordon, counsel for plaintiffs herein, made certain factual allegations which, in his view, distinguished the instant case from Teamsters and Evans. Essentially, Mr. Gordon, for the first time during the extended course of this litigation, contended that the layoffs in June, 1975 were not the result of the application of a bona fide neutral seniority system. In support thereof, he stated that, for the purposes of the layoff, it was improper for male and female police officers to be laid off from a single list and that that was the first time that the list had been merged. He further stated that, prior thereto, for example, for purposes such as choice of vacation and choice of assignments, female officers had only competed with other female officers on the basis of seniority, and males had competed only with other males.

4. First, the allegations by Mr. Gordon are completely inaccurate as is fully set forth in the affidavit of Michael J. Codd, Commissioner of the New York City Police Department.

5. Second, as indicated above, last week was the first time that such factual allegations have been asserted by plaintiffs. We submit, therefore, that even assuming arguendo the truth of the facts alleged, this Court lacks jurisdiction to consider plaintiffs' new claim.

6. On June 25, 1975, plaintiffs filed complaints with both the City Commission on Human Rights and the Equal Employment Opportunity Commission challenging the intended layoffs. The only allegations in those complaints were that the layoffs were discriminatory in that they perpetuated the effects of defendants' pre-Act hiring policies. They alleged that had patrolman and police trainee examinations been open to females between 1964 and 1969, plaintiffs would have taken such examinations, been appointed at an earlier date, and would therefore have accrued sufficient seniority to withstand the layoffs.

7. The complaint and amended complaint in this action likewise asserted that pre-Act "discriminatory" hiring practices were perpetuated by the neutral seniority system and thereby rendered the layoffs discriminatory under Title VII.

8. The facts urged upon this Court last week were not raised in the complaints set forth above, nor upon the subsequent motion to dismiss on the grounds that the layoffs were the result of a bona fide neutral seniority system within §703(h) of Title VII, nor upon plaintiffs' motion and defendants' subsequent cross-motion for summary judgment.

9. It is well-settled that the filing of timely charges with the E.E.O.C. is a prerequisite to federal jurisdiction under Title VII. McDonnell Douglas Corp. v. Green, 411 U.S. 782 (1973). United Airlines v. Evans, 45 U.S.L.W. 4566. Failure to do so divests this Court of

subject matter jurisdiction. Since plaintiffs never filed charges in the E.E.O.C. upon the facts now alleged, this Court lacks jurisdiction to consider plaintiffs' claim based thereon that the layoffs were not the result of a bona fide neutral seniority system.

10. Furthermore, since the complaint and amended complaint herein do not specify these new factual allegations and almost two years have passed since the institution of this suit, it would clearly be prejudicial to allow plaintiffs to further amend their complaint at this stage of the litigation to include these new factual allegations.

WHEREFORE, it is respectfully submitted that defendants' motion should be granted in all respects.

JUDITH A. LEVITT

Sworn to before me this
15th day of June, 1977.

PAUL L. BRENNAN
Notary Public, State of New York
No. 52-0408480
Qualified in Suffolk County
Commission Expires March 30, 1977

Affidavit of Michael J. Codd in Support of Defendants' [illegible]
Motion to renew Cross-motion for summary judgment

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - - - - - -x

BERALDINE L. ACHA, and ARLENE M. EGAN, each individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

ABRAHAM D. BEAME, individually and in his capacity as Mayor of the City of New York, MICHAEL J. CODD, individually and in his capacity as Police Commissioner of the New York City Police Department and THE CITY OF NEW YORK, as a public employer,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - - - - -x

**AFFIDAVIT**

STATE OF NEW YORK )
: .ss.:
COUNTY OF NEW YORK )

MICHAEL J. CODD, being duly sworn, hereby deposes and says:

1. He is the Police Commissioner of the City of New York, and has held that position since January, 1974. Prior to his appointment as Police Commissioner, he served in the uniformed force of the Police Department for 32 years, during which time he held every rank from Patrolman through Chief Inspector. As Police Commissioner, he has cognizance and control of the government, administration, disposition and discipline of the department, and the police force of the department, through the authority delegated to him by Section 434 of the Charter of the City of New York.

2. He is thoroughly familiar with the facts and circumstances in this action, and makes this affidavit in support of defendants' motion to renew a previous cross-motion for summary judgment and in support of defendants' application for a stay against further proceedings until the summary judgment motion has been determined by the Court.

3. From 1965 to 1973, two separate titles for sworn enforcement officers in the Police Department were maintained on the basis of sex, viz: Patrolman and Policewoman. The usual complement of Policewomen during this period approximated 290, all of whom were assigned to specialized tasks. However, the pay scale and job benefits for the position of Policewoman were identical to those of Patrolman. Therefore, the department wide benefit and competitive seniority was applicable equally to males and females. The probationary period was twelve months for both positions so that tenure was achieved equally by men and women. Full pay was reached in three annual increments from a starting salary, which was equal for both titles, to the top level, which was also equal. Longevity increments were earned equally by both Patrolmen and Policewomen. The length of annual vacation was determined in the same manner for both men and women, i.e., 20 working days a year for the first 3 years and 27 working days thereafter. Both competed equally in promotional examinations with the same weight given for accumulated seniority without distinction. Successful candidates on promotional examinations were placed on the same eligible list in rank order after combining test score and seniority and service credit, without regard to sex. Appointments were made to the same civil service rank from the same eligible list without regard to sex, and with no distinctions in benefits. Retirement eligibility was earned in the exact same manner by both men and women.

4. During the aforesaid time period, vacation selections were made within the smallest unit of assignment, e.g. precinct squad, in order of seniority in the department with no more than 12% of the total complement on vacation at one itme. To the extent that women were assigned to specialized tasks, they generally made vacation selections in competition with others in the specialized unit which may or may not have been comprised of only women.

5. During the aforesaid period, on information and belief, Section 80 and 81 of the New York State Civil Service Law were at all times in full force and effect. However, these Sections had never been considered for implementation with respect to the Police Department until the end of 1974.

6. Beginning in 1972, female police officers were assigned to patrol functions, and on January 22, 1973, then Police Commissioner Patrick V. Murphy requested that separate budget lines for Patrolman and Policewoman be eliminated, and combined in one budget line for the position of Patrolman/Policewoman. This request was complied with effective February 2, 1973. On April 23, 1973, and order was distributed throughout the Police Department eliminating the separate ranks of Patrolman and Policewoman and combining them into the single rank of Police Officer. Thereafter, for all practical purposes, the functions of male and female officers were merged, with the exception that women were still required to perform matron duty (the search and guarding of female prisoners and material witnesses).

7. After the lifting of a three-year hiring freeze which had lasted from February, 1970 through January 29, 1973, the Police Department resumed hiring of both male and female eligibles on an accelerated basis, and over 4,700 appointments were made by October 7, 1974, when a new hiring freeze was imposed. All female candidates who were then on an eligible list resulting from Examination No. 9081 for Policewoman were canvassed, and those qualified and available were offered appointment. The eligible list resulting from Examination No. 9080 for Patrolman, which was identical to Exam No. 9081 and given the same day, 10-25-69, was also completely canvassed. The median appointment date from the female list was July 30, 1973, while the median appointment date from the male list was October 1, 1973. All appointees were given the same training, and were made available for the same assignments (except duties at detention facilities which are segregated by sex).

8. In December, 1973, the first "unisex" examination was administered and a totally integrated list resulted. The Notice of Examination for this test contained the qualifications for the position of Police Officer, and made no distinctions based on sex.

9. In determining the order of lay-off of Police Officers in June, 1975 pursuant to Section 80 of the Civil Service Law, seniority and probationary status were the only factors that were considered.

WHEREFORE, it is respectfully requested that defendants' motion be granted in all respects.

Michael J Codd

MICHAEL J. CODD

Sworn to before me this

15th day of June, 1977

Samuel C. Marino

SAMUEL C. MARINO
Notary Public, State of New York
No. 43-4527424
Qualified in Richmond County
Commission Expires March 30, 1978

# Special Master's Third Interim Report

## PRELIMINARY STATEMENT

This Third Interim Report is limited to the issue of seniority with respect to the following seven claimants:

VANINA F. MAFFIA
CELIA ROTH
MARY ANN PAGANUCCI
PATRICIA CARDONE
MARTINA GUIDONE
ANNA MARIE MARTUCCIELLO
BEVERLY MALMBECK

A Report covering the issue of back pay with respect to those claimants will be submitted at a later date.

The general findings contained at Page 3 and 4 of my Interim Report dated January 17, 1977, as modified in the Preliminary Statement of my Second Interim Report dated March 18, 1977 also apply to this Third Interim Report.

## VANINA F. MAFFIA

VANINA F. MAFFIA was born on May 18, 1947, was appointed a Policewoman in The New York City Police Department on May 29, 1973, was laid off on June 30, 1975, and has not been reinstated (Tr. 4652-3). Claimant is unmarried and has no children (Tr. 4653). She received a high school diploma in June, 1965, a New Jersey driver's license in 1968 and a New York driver's license on April 11, 1973 (Tr. 4653).

In approximately 1966, claimant discussed her interest in the Police Department with her mother and her godfather (Tr. 4656, 4677, 4693, 4714). Claimant requested her mother to call the Civil Service Commission to find out when the next test for the position of Police Officer was scheduled (Tr. 4677, 4693). The claimant's godfather told her about the position of Police Trainee in approximately 1966 (Tr. 4657, 4713, 4717).

In September, 1967, the claimant's mother called the Applications Section of the Civil Service Commission and inquired about the availability of the Trainee position for the claimant (Tr. 4695, 4702, 4708, 4714, Plaintiffs' Maffia Exs. 1, 2 and 3). Thereafter, claimant's mother called the Applications Section again and left the claimant's name and address to be notified of the next Police

Department examination for women (Tr. 4657-8, 4660, 4705).

Examination No. 7065 for the position of Patrolman was given on May 11, 1968. The filing dates for that examination were from April 3, 1968 to April 23, 1968 and the median appointment date for the position of Patrolman from the eligibles list resulting therefrom was March 14, 1969 (DPF 15, 16).

If Examination No. 7065 for Patrolman was not limited to men, claimant would have been eligible to take that examination and except as indicated below, was otherwise qualified for appointment to the Police Department and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of March 14, 1969, which date, pursuant to the opinion of Judge Duffy, should be adjusted to April 11, 1973, the date she received her New York State Driver's license.

## CELIA ROTH

CELIA ROTH was born on July 10, 1942, was appointed a Policewoman in The New York City Police Department on May 30, 1973, was laid off on July 1, 1975 and has not been reinstated (Tr. 4736-7, 4745).

Claimant was married on May 30, 1961, was divorced on September 11, 1967, was remarried on September 22, 1967, and divorced on November 22, 1968 (Tr. 4737). She has three children born July 31, 1962, September 26, 1963, and November 26, 1964 (Tr. 4737).

Claimant received a high school diploma in June, 1960 and a driver's license in 1963 (Tr. 4737).

Claimant testified that she first became interested in becoming a Police Officer while in high school after a member of the F.B.I. spoke at the school (Tr. 4739, 4771, 4779). She also stated that while a sophomore in high school, she took a Judo course to prepare for a career in law enforcement (Tr. 4739, 4762-3, 4779-80).

Further, claimant testified that a month or two after her third child was born in late November, 1964, she went to the Department of Personnel on Thomas Street to obtain information concerning the position of Policewoman and was informed that she had just missed an examination (Tr. 4739-41, 4763, 4780). She also stated that after her trip to Personnel she began to purchase and read The Chief and that she discussed her interest in the Police Department with her friends and members of her family (Tr. 4741-3, 4781, 4783).

Claimant's father testified that he made inquiries on his dauther's behalf (Tr. 4771-3). A friend, MARYANNE POTTS, testified that her husband,who was a Police Officer, at claimant's request, made inquiries on her behalf (Tr. 4789).

Based upon the demeanor of claimant and her witnesses and the substance of their testimony, I do not find it credible that claimant expressed an interest in becoming a Police Officer while in high school and that she made inquiries at the Department of Personnel shortly after the birth of her third child. Nor do I find the balance of their testimony credible. Accordingly, claimant has not sustained her burden of establishing,by credible evidence, her entitlement to an earlier seniority date than the one she now has.

## MARY ANN PAGANUCCI

MARY ANN PAGANUCCI was born on November 21, 1942, was appointed a Policewoman in the New York City Police Department on August 31, 1973, was laid off on June 30, 1975 and has not been reinstated (Tr. 4851-2).

Claimant has never been married and has no children (Tr. 4852). She graduated from high school in June, 1960 and obtained a driver's license in 1962 (Tr. 4852).

Claimant testified that she first became interested in joining the Police Department in approximately 1959 when her brother was appointed to the Department (Tr.4852-4, 4868). She stated that she asked her brother to inform her when the next test for the position of Policewoman was scheduled but he failed to do so (Tr. 4861, 4878-9, 4870). After having missed the 1964 examination for Policewoman, claimant stated that she began reading The Chief to find out when the next Policewoman examination would be scheduled and ultimately learned of the examination she took from that newspaper (Tr. 4854-5, 4861-2, 4866, 4872, 4880, 4859-60). Apart from some casual inquiries claimant's brother stated that he made at his Precinct with respect to an upcoming Policewoman examination, there was no evidence of any inquiries made by the claimant on her own behalf (Tr. 4880).

Based upon the demeanor of the claimant and her brother and the substance of their testimony, both on direct and cross examination, I do not find their testimony to be credible. In particular, the explanation for claimant's failure to take the 1964 examination is far fetched and claimant's brother's responses to questions on cross examination were vague. Consequently, claimant must be denied an earlier seniority date than the one she now has.

## PATRICIA CARDONE

PATRICIA CARDONE was born on March 18, 1950, was appointed a Policewoman in The New York City Police Department on August 31, 1973, was laid off on June 30, 1975 and has not been reinstated (Tr. 4882-3).

Claimant was married in December, 1970, and has two children born December 2, 1971 and May 4, 1973 (Tr. 4882-3). She received a high school diploma in June, 1967 and a driver's license no later than December 31, 1969 (Tr.4883).

Claimant testified that she first became interested in becoming a Police Officer in late 1966 when her future husband, JOSEPH CARDONE, was planning to take a trainee examination (Tr. 4884-5, 4891, 4910). She discussed her interest with her Uncle, friends and future in-laws (Tr. 4885, 4906-8, 4911, 4921, 4927).

Thereafter, claimant and her future husband studied from his Arco book in anticipation of their both taking the test for Police Trainee (Tr. 4887-8, 4892, 4912-3, 4916, 4922, 4928). Claimant's future father-in-law and her friend, LYNN CAMINSKE, testified that they were aware of her interest in becoming a Police Trainee and observed claimant and her future husband studying for the test (Tr. 4921-3, 4927-8). However, in the early part of 1967, when claimant called the Department of Personnel to find out if women were eligible to take the Trainee examination scheduled for April of that year, she was informed that the examination was only for men (Tr. 4885, 4912-3, 4924).

After claimant's husband was appointed to the Police Department, he, at claimant's request, checked for Police Department examinations in the station house and in The Chief (Tr. 4914). In 1969, claimant's husband informed her of the upcoming Policewoman's examination (Tr.4894, 4914-5, 4919).

Examination No. 6127 for the position of Trainee was given on April 1, 1967. Examination No. 6127 was a walk-in examination. The median appointment date from the eligibles list resulting therefrom was June 23, 1967 (Tr. 4883, Plaintiffs' Ex. 3).

If Examination No. 6127 for Trainee was not limited to men, claimant would have been eligible to take that examination, was otherwise eligible for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of June 23, 1967.

## MARTINA GUIDONE

MARTINA GUIDONE was born on November 18, 1948, was appointed a Policewoman in The New York City Police Department on May 29, 1973, was laid off on June 30, 1975, and has not been reinstated (Tr. 4936-7).

Claimant graduated from high school in June, 1966 and received a driver's license on November 4, 1965 (Tr. 4936-7). She was married on October 23, 1976 and has no children (Tr. 4936-7).

Claimant testified that she discussed the Trainee position with her father, a Police Officer, while she was in high school (Tr. 4938-9, 4982-3, 4946, 4977-8). She indicated to her father that she would like to become a Trainee, but was told by him that the position was open only to men (Tr. 4947, 4984).

While in high school, she also indicated her interest in becoming a Police Officer to a pen pal living in Bristol, England, whose name she obtained from Spring 3100, a Police Department magazine (Tr. 4939-40, see also Plaintiffs' GUIDONE Exhs. 1A-D). She also began reading The Chief to find out about upcoming Police examinations (Tr. 4962-3, 4971).

Claimant's father testified that he made inquiries on his daughter's behalf, followed the Civil Service materials that were circulated in his Precinct and read The Chief (Tr. 4984-5, 4946, 4976, 4989, 4992).

In addition, a co-worker at the Nassau County Planning Commission testified that claimant discussed her desire to become a Police Officer with her (Tr. 5003-4, 5008), and that she saw claimant reading The Chief during lunch time to find out when she could take a test to join the Police Department (Tr. 5004-5, 5010).

Examination No. 1455 for the position of Trainee was given on March 12, 1966. The filing period for that examination was from November 3, 1965 to November 30, 1965, and the median appointment date for the eligibles list resulting therefrom was November 7, 1966 (Tr. 4937, Plaintiffs' Ex. 3).

If Examination No. 1455 was not limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment and would have accepted appointment as a Trainee.

Consequently, I find that claimant should be granted a seniority date of November 7, 1966.

## ANNA MARIE MARTUCCIELLO

ANNA MARIE MARTUCCIELLO was born on November 22, 1943, was appointed a Policewoman in The New York City Police Department on May 29, 1973, was laid off on June 30, 1975 and has not been reinstated (Tr. 5017-8).

Claimant graudated from high school in June, 1964 and received a driver's license prior to her 21st birthday (Tr. 5017-8). She is single and has no children (Tr. 5017-8).

Claimant testified that she first became interested in becoming a Police Officer when she became a school crossing guard while in the sixth grade and that her interest continued until she entered a convent in September, 1964 (Tr. 5020, 5022). She stated that after she left the convent in January, 1966, her interest in the Police Department resumed (Tr. 5023, 5043, 5059).

In substance, claimant and the witnesses who testified on her behalf - her stepmother, a friend, THERESA VARGAS, and her Uncle COSMO MARTUCCIELLO - stated that claimant discussed her interest in joining the Police Department with each of them and with Police Officers they could only recall as "Big Red" and "Justin" who frequented her grandmother's restaurant (Tr. 5027-30, 5050-1, 5059-60). They also stated that claimant read The Chief to find out if any tests for women were scheduled and that she purchased an Arco book which she studied (Tr. 5026, 5030-1, 5045-6). In addition, claimant testified that she discussed with a VINCENT OTTO, the test he was planning to take and was informed that it was not available to women (Tr. 5026-7, 5036). However, the only inquiry claimant made, herself, was in February or March of 1969 to the Department of Personnel (Tr. 5033).

Based upon my observation of the demeanor of claimant and her witnesses, their possible bias, the strength and accuracy of their recollection, and the substance of their testimony, I do not find their testimony to be credible. Accordingly, I find that claimant is not entitled to an earlier seniority date than the one she now has.

## BEVERLY MALMBECK

BEVERLY MALMBECK was born on June 25, 1946, was appointed a Policewoman in The New York City Police Department on May 29, 1973, was laid off on June 30, 1975 and has not been reinstated (Tr. 5070). Claimant is unmarried and has no children (Tr. 5070). She received a high school diploma in June, 1964 and a driver's license in 1964 (Tr. 5070).

Claimant testified that she became interested in becoming a Police Officer while she was in high school (Tr. 5071). She stated that her interest continued while she attended college in Beverly, Massachusetts, and that, at her request, her brother sent her copies of The Chief several times while she was at college (Tr. 5124, 5078-9, 5113-4, 5117).

In addition, claimant testified that she discussed her interest with Police Officer JOSEPH LEONARD during the Summer of 1966 and that he made inquiries for her at his Precinct (Tr. 5081-2, 5133-4). Claimant also maintains that she discussed her interest with one HENRY HELGESON who took a Patrolman's examination in 1966 but that he informed her that the test was only open to men (Tr. 5140-1, 5143). Claimant made no inquiries herself with respect to upcoming Police Department examinations (Tr. 5105).

Based upon my observation of the demeanor of claimant and her witnesses, their possible bias, the accuracy of their recollection, and the substance of their testimony, I do not find their testimony to be credible. Accordingly, I find that claimant is not entitled to an earlier seniority date than the one she now has.

## CONCLUSION

The claims of the following should be allowed to the extent indicated above:

VANINA F. MAFFIA
PATRICIA CARDONE
MARTINA GUIDONE

The claims of the following should be denied for the reasons set forth above:

CELIA ROTH
MARY ANN PAGANUCCI
ANNA MARIE MARTUCCIELLO
BEVERLY MALMBECK

Dated: New York, New York
June 27, 1977

Respectfully submitted,

RENEE J. ROBERTS
Special Master

# Special Master's Fourth Interim Report

## PRELIMINARY STATEMENT

The Fourth Interim Report is limited to the issue of seniority with respect to the following eight claimants:

MARY ANN HORNECK
SANDRA GONZALEZ
JANE WAYE
CAROL KAMINSKY
CAROL KANE
CAROL CONRY
KATHLEEN L. JAPPE
THEODORA MOSCATELLI

A Report covering the issue of back pay with respect to those claimants will be submitted at a later date.

The general findings contained at Pages 3 and 4 of my Interim Report dated January 17, 1977, as modified in the Preliminary Statement of my Second Interim Report dated March 18, 1977, also apply to this Fourth Interim Report.

## MARY ANN HORNECK

MARY ANN HORNECK was born on March 20, 1947, was appointed a Policewoman in The New York City Police Department on September 27, 1974, was laid-off on July 1, 1975, and has not been reinstated (Tr. 5333-4).

Claimant was married on December 8, 1973, and has one child born June 25, 1976 (Tr. 5334). She graduated from high school in June, 1964 and received a driver's license on March 20, 1965 (Tr. 5334-5).

Claimant testified that she was interested in becoming a Police Officer because of her family background. Her Uncle was a member of The New York City Police Department and her father and brothers took Police Department examinations (Tr. 5335-7). She also stated that she studied with her brothers, one of whom took the 1959 or 1960 Police Cadet test (when she was 12 or 13) and the other of whom took a Patrolman examination in 1966 (Tr. 5336, 5354).

Claimant also maintained that she discussed the 1964 Trainee test with a friend who took it and that she indicated an interest in taking that test if she could (Tr. 5337-9). In addition, she asserted that her interest in the Police Department continued while she attended college and thereafter. She stated that she read The Chief during this period of time and indicated her interest to members of her family (Tr. 5339-41).

It should be noted that claimant lived in California from September, 1970, until June, 1971 and that she declined appointment to the Police Department in January, 1973, because she could not give notice to her employer for whom she had worked for two months (Tr. 5346-7).

Based upon my observation of the demeanor of the claimant and her witnesses, their possible bias, the strength and accuracy of their recollection and the substance of their testimony, I do not find their testimony to be credible. Accordingly, I find that claimant is not entitled to an earlier seniority date than the one she now has.

## SANDRA GONZALEZ

SANDRA GONZALEZ was born on August 6, 1943, was appointed a Policewoman in The New York City Police Department on August 30, 1973, was laid-off on or about July 1, 1975, and has not been reinstated (Tr. 5383-4).

Claimant was married on January 23,1965, and has three children born on October 1, 1965, August 19, 1966 and August 4, 1967 (Tr. 5383-4, 5416). She received a high school diploma in June, 1961, and a driver's license in 1961 (Tr. 5383-4).

Claimant stated that she first became interested in Police work as a youngster. Her brother testified that he remembered that she expressed an interest in the Police Department in 1960 (when he was approximately 7 years old) and her husband, whom she married in 1965, recalled that she spoke of becoming a Police Officer in 1960 (Tr. 5384, 5412-3, 5417). Despite this asserted interest, she was not aware of the 1964 Policewoman examination (Tr. 5388).

Claimant testified that she called the New York City Civil Service Commission in 1965, after her first child was born, to inquire when a Police Department test for women would be given (Tr. 5387, 5400). Her husband testified that he was present at home when the call was made and encouraged it (Tr. 5387-8, 5419-22). Claimant offered no explanation as to why the call was made at this specific time, particularly since claimant worked for the Department of Health from 1961 through 1968, except for a period of time in 1964, when she worked for the New York Telephone Company (Tr. 5401). It should be noted that because claimant's husband became ill in 1968 and required open heart surgery, claimant left work and went on welfare (Tr. 5392-3). She testified that the Police Department would have paid her enough money to enable her to return to work and pay someone to care for her husband and children (Tr. 5393).

Based upon my observation of the demeanor of the claimant and her witnesses, their possible bias, the strength and accuracy of their recollection and the substance of their testimony, I do not find their testimony to be credible. Accordingly, I find that claimant is not entitled to an earlier seniority date than the one she now has.

## JANE WAYE

JANE WAYE was born on May 26, 1942, was appointed a Policewoman in The New York City Police Department on November 19, 1973, was laid-off in July, 1975, and has not been reinstated (Tr. 5541-2).

Claimant was married on December 6, 1958, and was divorced in 1970. She has two children who were born in May, 1959 and July, 1960 (Tr. 5541). Ms. Waye received a high school equivalency diploma on August 27, 1970 and a driver's license on May 2, 1967 (Tr. 5541).

Claimant testified that she first became interested in becoming a Police Officer in 1958, after a bad experience with plainclothes police officers (Tr. 5543). However, she took no steps to become a Police Officer until after she separated from her husband in 1967 or 1968 (Tr. 5546-9). She called the Department of Personnel, the 50th Precinct and also read The Chief (Tr. 5548-9, 5561-3, 5567, 5569). Although the record is not clear as to whether claimant separated from her husband in 1967 or 1968 (Tr. 5546, Defendants' Exhibit A), she applied to take a home-study course on April 27, 1968 to prepare for the high school equivalency examination (Tr. 552, WAYE Ex. 1). Claimant testified that she applied to take the course because she was not a high school graduate and learned of the high school qualification for appointment to the Police Department in the course of her calls to the Department of Personnel (Tr. 5551).

Examination No. 8046 for the position of Patrolman was given on July 20, 1968. Filing for that examination was in June, 1968, and the median appointment date for the eligibles list resulting therefrom was June 30, 1969 (DPF 15, 16).

If Examination No. 8046 was not limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of June 30, 1969, which date, pursuant to the Opinion of Judge Duffy, should be adjusted to August 27, 1970, the date claimant obtained her high school equivalency diploma.

## CAROL KAMINSKY

CAROL KAMINSKY was born on October 20, 1947, was appointed a Policewoman in The New York City Police Department on February 26, 1973, was laid-off on June 30, 1975 and has not been reinstated (Tr. 5906-7).

Claimant was married in March, 1974, was divorced in November, 1975 and has no children (Tr. 5906-7). She received a high school diploma in June, 1965 and a driver's license on December 31, 1965 (Tr. 5906-7, 5910).

Claimant testified that she first became interested in a career with the Police Department in 1964, when her Uncle began studying for appointment to that department and asked him to advise her of upcoming examinations (Tr. 5907-9). She also stated that she discussed her interest with her father, mother and co-workers at the New York Telephone Company (Tr. 5909). Further, she claimed to have telephoned the Department of Personnel in the Summer of 1965, to have subscribed to The Chief and to have purchased an Arco book entitled "Policewoman Matron", in the Summer of 1965 (Tr. 5909, 5911, 5917).

However, claimant's testimony was vague, if not inconsistent (compare Tr. 5907 with Tr. 5908, Tr. 5912 and Tr. 5913; also compare Tr. 5925 with Tr. 5928).

The only witness who testified on behalf of claimant was her mother, MARION KLIPP. It must be noted that Mrs.

Klipp's testimony in and of itself was inconsistent, (see Tr. 5937-42) and contradicted her daughter's testimony (compare Tr. 5910 with Tr. 5941).

Based upon my observation of the demeanor of claimant and her witness, their possible bias, the accuracy of their recollection and the substance of their testimony, I do not find their testimony to be credible. Accordingly, I find that claimant is not entitled to an earlier seniority date than the one she now has.

## CAROL KANE

CAROL KANE was born on December 24, 1945, was appointed a Policewoman in The New York City Police Department on October 29, 1973, was laid off on June 30, 1975, and has not been reinstated (Tr. 6081).

Claimant was married in August, 1964, and has four children born March 24, 1965, June 26, 1967, February 5, 1969, and July 16, 1970 (Tr. 6081-2).

She obtained a high school diploma in June, 1963, a New Jersey driver's license in 1965 and a New York driver's license in 1969 or 1970 (Tr. 6081-2, 6083, 6103).

Claimant and the witnesses who testified on her behalf stated that she first became interested in becoming a police officer while in high school (Tr. 6083, 6129), when she had discussions with her father, a New York City Police Officer,about the position of Policewoman (Tr. 6083-4). Her interest in the Police Department continued after her marriage in 1964 to James Kane (Tr. 6084).

In 1965, claimant studied the Arco book with her husband before he took the 1965 examination for Patrolman (Tr. 6086, 6088, 6110-11). Thereafter, claimant purchased the Arco book for the Policewoman-Matron test and studied and practiced taking the tests in that book (Tr.6088-90, 6112, 6121). She also read The Chief at her father's home, looking for announcement of a Police Department test (Tr. 6092, 6109, 6116-7).

Examination No. 1557 for the position of Patrolman was given on March 12, 1966. The filing dates for that examination were from December 1, 1965 to February 25, 1966 and the median appointment date for the position of Patrolman from the eligibles list resulting therefrom was March 1, 1967 (DPF 15, 16).

If Examination No. 1557 for Patrolman was not limited to men, claimant would have been eligible to take that examination and, except as indicated below, was otherwise qualified for appointment to the Police Department and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of March 1, 1967, which date, pursuant to the Opinion of Judge Duffy, should be adjusted to the date she received her New York State Driver's license, upon presentation of evidence as to the exact date in 1969 or 1970, when she received that license.

## CAROL CONRY

CAROL CONRY was born on January 25, 1949, was appointed a Policewoman in The New York City Police Department on June 25, 1973, was laid off on June 30, 1975, and has not been reinstated (Tr. 6136).

Claimant was never married and has no children (Tr. 6136). She graduated from high school in June, 1966, and received a driver's license in 1967, prior to her twenty-first birthday (Tr. 6136).

Claimant first became interested in becoming a Police Officer while in high school and discussed her interest with her parents, her brother (who is a New York City Police Officer) and her teacher, Sister Rita King (Tr. 6138-9, 6160-1, 6169).

Claimant testified that in approximately March, 1966, she called The Department of Personnel to make inquiries about the position of Trainee and was told that the job was not open to females (Tr. 6140-1, 6152-3). Sometime in 1967, she called Personnel again and was told that no Police Department examination for women was scheduled (Tr. 6142, 6156-7).

At her brother's suggestion, she brought and read The Chief to keep informed about Police Department examinations (Tr. 6142-3).

Examination No. 1455 for the position of Trainee was given on March 12, 1966. The filing dates for that examination were from November 3, 1965 to November 20, 1965, and the median appointment date for the position of Trainee from the eligibles list resulting therefrom was November 7, 1966 (Tr. 6137, Plaintiffs Ex. 3).

If Examination No. 1455 for Trainee was not limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment to the Police Department, and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of March 1, 1967.

## KATHLEEN L. JAPPE

KATHLEEN L. JAPPE was born on April 7, 1948, was appointed a Policewoman in The New York City Police Department on March 26, 1973, was laid-off on or about June 30, 1975, and has not been reinstated (Tr. 6217).

Claimant was married on January 31, 1975, and has no children (Tr. 6217). She received a high school diploma in June, 1966 and a driver's license in 1965 (Tr. 6217).

Claimant testified that she first became interested in becoming a Police Officer in May, 1966, during her senior year in high school. She stated that she had a conversation with a friend of the family,who was a Police Officer, at his daughter's Communion (Tr. 6250). According to claimant and the friend, they discussed the duties of a Policewoman and the Trainee position (Tr. 6218-9, 6238-9).

In addition, claimant stated that she thereafter wrote to the Department of Personnel asking to be placed on their mailing list, read The Chief for two months in 1966 and bought and studied an Arco review book in the Summer of 1966 (Tr. 6219-20, 6222-3, 6239-40, 6243). Moreover, she stated that she subsequently had many conversations with her Police Officer friend about her interest in the Police Department and discussed that interest with a neighbor and a brother (Tr. 6220, 6221, 6221-2).

It should be noted that claimant attended college from 1966 to 1970 but stated that her attendance at college would not have interfered with her accepting a Police Department appointment and that she would have left college, if necessary, in order to accept such appointment (Tr. 6244). Indeed, claimant left the teaching position for which she trained at college to accept appointment in the Police Department (Tr. 6245).

Examination No. 1455 for the position of Trainee was given on March 12, 1966. The filing dates for that examination were from November 3, 1965 to November 30, 1965 and the median appointment date from the eligibles list resulting therefrom was November 7, 1966 (Tr. 5217, Plaintiffs' Ex. 3).

If Examination No. 1455 for Trainee was not limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment to the Police Department and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of November 7, 1966.

## THEODORA MOSCATELLI

THEODORA MOSCATELLI was born on September 8, 1942, was appointed a Policewoman in The New York City Police Department on June 25, 1973, was laid-off on July 1, 1975 and has not been reinstated (Tr. 6260, 6274).

Claimant was married on February 14, 1965 and has no children (Tr. 6260. She obtained a high school diploma in June, 1960 and a driver's license between 1958 and 1961 (Tr. 6260).

Claimant testified that she first became interested in a position in the New York City Police Department in 1966 when she saw a notice of a Policewoman's test for the Nassau County Police Department in The Chief (Tr. 6262-3). She discussed her interest with family and friends and read The Chief (Tr. 6294). In mid-1966, claimant called The New York City Department of Personnel to inquire about Police Department tests (Tr. 6263-4). At the suggestion of the Department of Personnel, she wrote and requested to be put on the list for a test application for Policewoman (Tr.6264, 6282).

Claimant, her brother and a neighbor stated that she would have taken the May, 1968 New York City Police Department Patrolman Examination along with her brother if she, as a woman, was eligible to do so (Tr. 6269-70, 6290-1, 6306).

Thereafter, claimant called the Policewoman's Bureau and wrote another letter to [illegible] Department of Personnel to inquire about Police Department examinations (Tr. 6265, 6272, 6302).

In February, 1969, claimant took and passed an examination for the Yonkers Police Department, which she learned about from reading The Chief and for which she had applied in 1968 (Tr. 6273-4, 6285, MOSCATELLI Ex. 2).

Examination No. 7065 for the position of Patrolman was given on May 11, 1968. The filing period for that examination was from April 3, 1968 to April 23, 1968 and the median appointment date for the eligibles list resulting therefrom was March 14, 1969 (Tr. 6261, Plaintiffs' Ex. 3).

If Examination No. 7065 was not limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment and would have accepted appointment as a Trainee.

Consequently, I find that claimant should be granted a seniority date of March 14, 1969.

## CONCLUSION

The claims of the following should be allowed to the extent indicated above:

JANE WAYE
CAROL KANE
CAROL CONRY
KATHLEEN L. JAPPE
THEODORA MOSCATELLI

The claims of the following should be denied for the reasons set forth above:

MARY ANN HORNECK
SANDRA GONZALEZ
CAROL KAMINSKY

Dated: New York, New York
July 5, 1977

Respectfully submitted,

Renee J. Roberts

RENEE J. ROBERTS
Special Master

# Plaintiffs' Reply Affidavit of Murray A. Gordon

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----------------------------------------------x

BERALDINE L. ACHA and ARLENE M. EGAN, :
each individually and on behalf of all
others similarly situated, :

Plaintiffs, :

-against- :

ABRAHAM D. BEAME, individually and in :
his capacity as Mayor of the City of
New York, MICHAEL J. CODD, individually and in his capacity as Police :
Commissioner of the New York City :
Police Department, and THE CITY OF
NEW YORK, as a public employer, :

Defendants. :

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AFFIDAVIT

75 Civ. 3128
(KTD)

STATE OF NEW YORK )
) SS.:
COUNTY OF NEW YORK )

MURRAY A. GORDON, being duly sworn, deposes and says:

1. I am a member of the firm of MURRAY A. GORDON, P.C., attorneys for the plaintiffs herein and the class they represent in the above entitled action. I submit this affidavit in opposition to defendants' motion pursuant to Rules 56 and 60 of the Federal Rules of Civil Procedure, to renew their cross-motion for summary judgment which was previously denied by this Court by an Opinion and Order dated July 16, 1976.

2. Defendants argue that "all allegations of actual discrimination occurred prior to 1972". (Defendants' Memorandum of Law, p. 9.) They conclude from this that none of the numerous acts of discrimination which have been demonstrated herein were in violation of Title VII of the Civil Rights Act of 1964.

3. Defendants' contention overlooks the fact that all the acts of discrimination herein, both before and after 1972, were in violation of 42 U.S.C. §1983 and the Fourteenth Amendment to the United States Constitution. As is discussed in more detail in plaintiff's Memorandum of Law, defendants' assumption that the perpetuation of pre-1972 discrimination against the class herein, which pattern of discrimination continued at least until the time of the layoff, was not unlawful under Title VII, is equally unwarranted. More fundamentally, however, defendants' assertion that there were no acts of discrimination against class members after March 24, 1972, is inaccurate. The record herein is virtually undisputed that the pre-1972 pattern of intentional discrimination against women in the New York City Police Department ("PD"), continued at least up and until the time of the layoffs.

4. It is undisputed that prior to 1973 different examinations were given for the position of Policewoman and Patrolman, and women were not eligible for or permitted

to take the latter. An examination for the position of Policewoman (Examination No. 9986), was given on or about March 21, 1964. The next such examination (Examination No. 9081) was given on October 25, 1969. As appears from records which have been supplied by defendants, approximately seventeen examinations were given for the positions of Patrolman and/or Police Trainee between the date on which Examination No. 9968 was given and the date upon which Examination No. 9081 was given (see plaintiffs' Exhibits 1, 2, 3):

| TITLE | EXAMINATION NO. | DATE OF WRITTEN TEST |
|---|---|---|
| Patrolman | 9996 | November 14, 1964 |
| Police Trainee | 1215 | January 16, 1965 |
| Patrolman | 1382 | May 15, 1965 |
| Patrolman | 1506 | October 16, 1965 |
| Police Trainee | 1455 | March 12, 1966 |
| Patrolman | 1577 | March 12, 1966 |
| Patrolman | 6013 | June 11, 1966 |
| Patrolman | 6069 | October 22, 1966 |
| Patrolman | 6083 | January 21, 1967 |
| Patrolman, Police Trainee | 6127 | April 1, 1967 |
| Patrolman, Police Trainee | 7017 | June 3, 1967 |
| Police Trainee | 7046 | November 4, 1967 |
| Patrolman, Police Trainee | 7065 | May 11, 1968 |

| TITLE | EXAMINATION NO. | DATE OF WRITTEN TEST |
|---|---|---|
| Patrolman, Police Trainee | 8046 | July 20, 1968 |
| Patrolman, Police Trainee | 8108 | January 18, 1969 |
| Patrolman | 9019 | April 5, 1969 |
| Patrolman | 9049 | June 28, 1969 |

5. On October 25, 1969 two separate examinations, No. 9080 ("Exam 9080") and No. 9081 ("Exam 9081"), were given for Police Trainee-Patrolman and Policewoman, respectively. Although these examinations were announced and administered separately, the questions were the same and the examinations were graded in the same manner; separate eligible lists, however, were established as a result of these two examinations. Exam 9080 was open only to men who were not less than 16 years of age on the date of the written examination and 17 years of age on the date of appointment. Exam 9081 was open only to women not less than 19 years of age on the date of the written examination and 21 at date of appointment. Men passing Exam 9080 were eligible for the position of Police-Trainee; a position which entitled them to become Patrolmen upon their 21st birthday (plaintiffs' Exhibit 3). There was no comparable trainee positions available for women.

6. Between approximately 1970 and approximately February, 1973, no women were appointed to the PD as a result

of the hiring freeze. However, as late as May 8, 1970, men were appointed to the position of Trainee, including approximately 125 candidates who took and passed Exam 9080. (See defendants' Memorandum of Law, ["DML"] at 5-6.)

7. Between May, 1970 and January, 1973, during which time defendants allege that there were no appointments to the position of Patrolman (DML at 5), men who had previously been appointed as Trainees were appointed as Patrolmen upon attaining their 21st birthday. (See, e.g., 6/27/77 affidavit of Paul L. Brennan, ¶ 3.) Based upon computer printouts of the composition of the PD which have been made available to our firm by defendants, it appears that a minimum of 130 males, who had previously been appointed as Trainees, were appointed as Patrolmen upon their 21st birthday, between May, 1970 and January, 1973. (The number may in fact have been greater than 130 as this data only includes persons who are currently in the PD.) The appropriate number of such appointments made in each month between May, 1970 and January, 1973 is set out in the following table:

| MONTH | YEAR | # PATROLMAN APPOINTMENTS |
|---|---|---|
| May | 1970 | 2 |
| June | 1970 | 3 |
| July | 1970 | 4 |
| August | 1970 | 2 |

| MONTH | YEAR | # PATROLMAN APPOINTMENTS |
|---|---|---|
| September | 1970 | 2 |
| October | 1970 | 1 |
| November | 1970 | 1 |
| December | 1970 | 3 |
| January | 1971 | 4 |
| February | 1971 | 2 |
| March | 1971 | 3 |
| April | 1971 | 7 |
| May | 1971 | 3 |
| June | 1971 | 3 |
| July | 1971 | 3 |
| August | 1971 | 4 |
| September | 1971 | 6 |
| October | 1971 | 2 |
| November | 1971 | 4 |
| December | 1971 | 2 |
| January | 1972 | 8 |
| February | 1972 | 6 |
| March | 1972 | 6 |
| April | 1972 | 5 |
| May | 1972 | 7 |
| June | 1972 | 5 |
| July | 1972 | 3 |

| MONTH | YEAR | PATROLMAN APPOINTMENTS |
|---|---|---|
| August | 1972 | 5 |
| September | 1972 | 2 |
| October | 1972 | 8 |
| November | 1972 | 8 |
| December | 1972 | 5 |
| January | 1973 | 1 |

8. As the above table demonstrates, even after March 24, 1972, the date Title VII became applicable to municipalities, the PD continued their discriminatory practices of appointing men Patrolmen while appointing no Policewomen. Women had been barred from appointment as Trainees although they took a similar or identical examination to those taken by the men. It should be noted that the aforesaid appointments of men only continued between July, 1972 and January, 1973, during which time at least 32 Patrolman appointments were made. These discriminatory appointments occurred within three years of the commencement of the present action. The applicable statute of limitations under 42 U.S.C. §1983 for actions arising in New York is three years. Kaiser v. Cahn, 510 F.2d 282, 284-285 (2d Cir. 1974).

9. In or about February, 1973, the PD began appointing women as Policewomen. These appointments, however, were made from separate lists, on a ratio of four men to one

woman, regardless of their grades on similar or identical examinations. The use of separate lists for men and women for appointments in 1973 cannot be justified by reference to a seniority system, as none of these applicants had yet been placed in a seniority system. Moreover, the long pattern beginning in approximately February, 1973 was, as before, based upon a fixed quota of women -- 20% of the new appointees.

10. All of the women appointed in and after February, 1973 came from a list established as a result of Exam 9081. Men appointed in and after February, 1973 were appointed from approximately five different lists, which were established from examinations from which women were barred. The four-to-one ratio used in appointing men and women to the PD resulted, in many cases, in men being appointed earlier than women who received higher grades on similar or identical examinations. But even more significantly, the appointment of men in the period starting February, 1973 was exclusively from lists resulting from examinations from which women were barred. Each such appointment was, therefore, a separate act of discrimination because it was the product of a discriminatory examination and list. This discrimination wasneither exculpated nor extenuated by the 20% apportionment rate from the women's single test since that merely reflected the lessened opportunity afforded women to join the PD, not the number of women in-

terested and qualified to do so.

11. The described post-1972 discriminatory appointments from lists based upon examinations from which women were barred continued at least to September 27, 1974 as appears from the computer printout of the preferred lists supplied to counsel by defendants. This date of September 27, 1974 is, of course, less than 300 days before the layoffs and charges filed with the EEOC by the plaintiffs here.

12. Defendants allege that the median appointment date from Exam 9080 for Patrolman/Trainee was October 1, 1973, and that the median appointment date from Exam 9081 for Policewoman was July 30, 1973. (Affidavit of Michael Codd, ¶7.) This contention ignores the fact that persons from Exam 9080 had been appointed as early as May of 1970, while no women were appointed from the Exam 9081 list until approximately February, 1973. Defendants' contention also ignores the fact that four other lists were used for appointment to the PD in 1973. These lists were established from examinations held in 1969 and 1970 which were only open to men. Moreover, defendants fail to note that, as appears from the computer printouts of the PD supplied by defendants, in many instances, men who took Exam 0013 given on May 9, 1970, were appointed prior to women who took and passed Exam 9081 on October 25, 1969. In any event, the median appointment date is irrelevant in the

present context; the numbers of appointments and the manner by which they generated and controlled were, as shown, a function of sex discrimination, and therefore determinative.

13. Defendants state that a unisex examination for the PD was given in December, 1973 (Codd affidavit, ¶8). They fail to note, however, that only or virtually only men were appointed from the resulting eligibles list.

14. Defendants do not dispute that, prior to February, 1973, there were separate budget lines for the title of Patrolman and Policewoman. However, defendants allege that on or about April 23, 1973, the separate ranks of Patrolman and Policewoman were combined into the single rank of Police Officer. (Affidavit of Michael J. Codd, ¶6.) However, as is set out in the affidavit of Maureen Kempton, at least as late as May, 1973, women appointed to the PD were given identification cards referring to them as "Policewomen" (affidavit of Maureen Kempton, ¶3). New identification cards were received in May, 1975, just prior to the layoffs, on which Maureen Kempton was referred to as a "Police Officer". Layoff notices were received a few weeks later, based upon the seniority of PD personnel as Police Officers. (Affidavit of Maureen Kempton, ¶3.)

15. The June 30, 1975 layoffs were based upon a single list comprising men and women in the PD. Layoffs

based upon a single list were not compelled by Civil Service Law §80, as suggested by defendants. The separate titles of Patrolman and Policewoman are established by §§434a-1.0 and 434a-2.0 of the Administrative Code of the City of New York. These provisions do not provide for the unisex title of "Police Officer". There has, therefore, been no showing that the defendants were required to use a merged list of men and women, who had been appointed from separate lists to separate titles, for the June, 1975 layoffs. Defendants acknowledge that the issue whether to establish a single, merged layoff list of Policewomen and Patrolmen was not even considered until the end of 1974. (Affidavit of Michael J. Codd, ¶5.)

16. That the PD continued to recognize separate titles for men and women in the PD in and after 1973 is confirmed by the affidavit of Maureen Kempton. Upon information and belief, and as is set out in more detail in the affidavit of Maureen Kempton, in and after 1973, women were permitted to compete on equal terms with men for assignments and vacations, only to the extent permitted by the Borough Office, which regulated the total assignment of women in the PD. (Affidavit of Maureen Kempton, ¶4.) Moreover, the affidavit of Maureen Kempton alleges that, since her return to the PD on March 31, 1977, pursuant to order of this Court, she has been required to make vacation selections in competition only with women.

(Affidavit of Maureen Kempton, ¶5.) Finally, the New York City Commission on Human Rights, in its April, 1977 finding of "Probable Cause" that the PD is *currently* discriminating against women, noted that women in the PD who are assigned to the Field Service Division are involuntarily assigned to 10 out of 73 (and to none of the other) precincts. No such limitation is placed upon men in the PD. (A copy of the finding by the Commission is annexed as Exhibit " D " to plaintiffs' Memorandum of Law.)

17. That the June 30, 1975 layoffs constituted intentional discrimination against women is further confirmed by the manner in which ties were broken for purposes of layoffs. The June 30, 1975 layoffs were based upon the date of appointment to the PD as a Patrolman, Policewoman or Trainee. Those persons who were "last-hired" were the first to be laid-off. However, in numerous instances, large numbers of candidates had the same effective date of appointment for layoff purposes. Based upon analysis of the computer printout of the original preferred list, in all such instances, ties were broken on the basis of the date of establishment of the list from which an individual had been appointed. The list for Exam 9081 for the position of Policewoman, given on October 25, 1969, was established after the list for Exam 9080 for Patrolman/Trainee, also given on October 25, 1969, and the list for Exam 0013 for Patrolman/Trainee

given on May 9, 1970. The effect of this tie-breaking procedure was, in all instances in which men and women had an identical appointment date, to lay off the women first, and to give the men with that appointment date preference in reappointment. For example, all men appointed on October 29, 1973 from Exam 9080, given on October 25, 1969, and from Exam 0013, given on May 9, 1970, were given higher places on the preferred list than any women appointed on October 29, 1973 from Exam 9081, which was given on October 25, 1969. This order of layoff and reinstatement is not required by §§80 or 81 of the Civil Service Law, and demonstrates an intention on the part of defendants to place women in the lowest possible position on their "seniority" roster.

18. In the latter part of 1975, after the layoffs, I became aware of the discriminatory nature of the aforesaid tie-breaking procedure. I brought the procedure to the attention of defendants, including Mr. William Roskin, Esq., counsel for the New York City Department of Personnel, and indicated that I would take appropriate legal action to deal with this system if it were not corrected. Defendants revised their system of breaking ties in early 1976, within a few months of my conversation with Mr. Roskin,for reinstatement purposes. Ties are now broken on the basis of the date of the examination: ties between Exams 9080 and 9081, which were given on the same date, are broken on the basis of the grade achieved on these

identical examinations. The fact that this procedure was changed demonstrates that the original method of breaking ties, which always worked to the disadvantage of women, was not mandated by any applicable statute, rule or regulation, but was, rather, a result of an exercise in discretion demonstrating animus against women in the PD.

19. Defendants argue that class members may not be awarded retroactive seniority credit to a date earlier than March 24, 1972, the date upon which Title VII became applicable to municipalities (DML at 16), relying upon the recent decision of the United States Supreme Court in International Brotherhood of Teamsters v. United States, 45 U.S.C.A. 4506 (May 31, 1977). Defendants conclude that the current hearings to determine retroactive seniority are "irrelevant". (DML at 16.) Defendants' assumption as to the effect of Teamsters is inaccurate, as is set out in plaintiffs' Memorandum of Law. Beyond that, however, defendants have advised our office that persons with seniority dates as late as March 26, 1973 are scheduled for permanent rehire on or about July 15, 1977. An award of a March 24, 1972 retroactive seniority date would, therefore, have tremendous significance for purposes of reinstatement, even assuming, arguendo, that defendants are correct in their contention as to the effect of Teamsters herein.

Murray A. Gordon
MURRAY A. GORDON

Sworn to and subscribed before
me this 3 day of July, 1977.

Carolyn Young

CAROLYN YOUNG
Notary Public, State of New York
No. 31 [illegible]

Plaintiffs' Reply Affidavit of Maureen Kempton

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
-------------------------------------------x

BERALDINE L. ACHA and ARLENE M. EGAN, :
each individually and on behalf of all
others similarly situated, :

Plaintiffs, :

-against- : **AFFIDAVIT**

ABRAHAM D. BEAME, individually and in : 75 Civ. 3128
his capacity as Mayor of the City of (KTD)
New York, MICHAEL J. CODD, indivi- :
dually and in his capacity as Police
Commissioner of the New York City :
Police Department, and THE CITY OF
NEW YORK, as a public employer, :

Defendants. :

-------------------------------------------x

STATE OF NEW YORK )
) SS.:
COUNTY OF NEW YORK )

MAUREEN KEMPTON, being duly sworn, deposes and says:

1. I am a member of the class represented by plaintiffs in the above entitled action.

2. On October 25, 1969, I took and passed Examination No. 9081 for the position of Policewoman.

3. On May 29, 1973, I was appointed to the New York City Police Department. My identification card, provided to me by the Department, listed my title as "Policewoman". I received a second identification card in May of 1975 which listed my title as "Police Officer". In May of 1975, after

I received my second identification card, I was notified that I would be laid-off. On June 30, 1975, I was laid-off from the Police Department solely for budgetary reasons. On March 31, 1977, I was reinstated pursuant to the order and judgment of this Court entered on March 28, 1977.

4. Prior to my layoff, I was permitted to bid with men in my squad for assignments and vacations only to the extent permitted by the Borough Office of the Police Department. The Borough Office regulated the assignments and vacations of all women throughout the borough. This system had the apparent effect, for example, of guaranteeing that women throughout the borough did not all take their vacations at the same time. In choosing my vacation, therefore, I was always subject to being "bumped" by another Policewoman with greater seniority, even though my date of appointment would otherwise have enabled me to obtain my desired vacation date if I had only been bidding for my vacation within my squad. No comparable limitation on bidding for vacation dates or assignments was, to my knowledge, imposed upon males in the Police Department who were entitled to bid for assignments and vacations within their squads, without ordinarily being subject to bumping by senior men from other squads.

5. Since my reinstatement to the Police Department on March 31, 1977, I have only been permitted to bid for

my vacations against other women.

Maureen Kempton
MAUREEN KEMPTON

Sworn to and subscribed before

me this 7 day of July, 1977.

Carolyn Young

CAROLYN YOUNG
Notary Public, State of New York
No. 31-4504170
Qualified in New York County
Commission Expires March 30, 1979

Defendants' Reply Affidavit of Judith Levitt

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - - - - -x

BERALDINE L. ACHA and ARLENE M. EGAN, :
each individually and on behalf of
all others similarly situated, :

Plaintiffs, : **REPLY AFFIDAVIT**

-against- : (75 Civ. 3128 (KTD)

ABRAHAM D. BEAME, individually, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

1. I am an Assistant Corporation Counsel in the office of W. BERNARD RICHLAND, Corporation Counsel of the City of New York, and am thereby fully familiar with the facts in this action. I submit this affidavit in response to the affidavits of Murray A. Gordon, attorney for plaintiffs, and Maureen Kempton, submitted in opposition to defendants' motion pursuant to Rules 56 and 60 of the Federal Rules of Civil Procedure.

2. The primary purpose of this affidavit is to bring into focus precisely what issues and facts are before this Court. The affidavits and memorandum submitted by plaintiffs attempt to introduce new "facts" and new causes of action two years after the commencement of this suit. Indeed, plaintiffs' counsel has consumed many pages obfuscating the issues with irrelevant and unsubstantial allegations.

3. The complaints filed by the named plaintiffs, Acha and Egan, in June, 1975, in the New York State Division of Human Rights and the Equal Employment Opportunity Commission (EEOC) alleged that the layoffs on June 30, 1975 were discriminatory in that they perpetuated the effects of past discrimination. The past discrimination alleged was the administration of separate examinations for males and females prior to October 25, 1969 when plaintiffs took Examination No. 9081 for the position of policewoman. Plaintiffs alleged that had the prior examinations for patrolman and/or trainee been open to women, they would have taken such examinations, been appointed at an earlier date, and therefore would have accrued sufficient seniority to withstand the layoffs.

Additionally, plaintiffs alleged the existence of a four-to-one hiring quota in 1973 after the job freeze was lifted.

4. Substantially the same allegations were set forth in the complaint and amended complaint filed in this Court.

5. Defendants moved to dismiss the complaint on the grounds that the layoffs were the result of a bona fide neutral seniority system within the meaning of §703(h) of Title VII, i.e., that the layoffs resulted from the proper application of Section 80 of the Civil Service Law. This Court found that the layoffs were the result of a bona fide neutral seniority system and dismissed the complaint.

Plaintiffs appealed and the Court of Appeals reversed, holding that the layoffs were not immunized by

§703(h) because they perpetuated the effects of past discrimination. Plaintiffs did not contend, nor did the Court find, that the layoffs were discriminatory for any other reason.

6. Defendants subsequently moved for summary judgment. Plaintiffs again did not contend that the layoffs were discriminatory except in that they perpetuated the past effects of discrimination.

7. Plaintiffs have introduced no evidence to support the allegation that a hiring quota was implemented in 1973. The affidavit of Michael J. Codd, Commissioner of the New York City Police Department, dated June 15, 1977, refutes the implementation of a hiring quota. Mr. Gordon's affidavit is not competent to rebut the Commissioner's sworn statement. In fact, an attorney's affidavit can not be introduced to create a disputed factual issue on a motion for summary judgment.

8. It is undisputed that the last time women were excluded from a Police Department examination was in June, 1970, Exam. No. 0013 for the position of Patrolman/Trainee.

9. It is undisputed that, prior to that date, and no later than October 25, 1969, all class members had taken and passed an examination for the position of policewoman.

10. On October 25, 1969, Examination No. 9080 was administered for the positions of patrolman and trainee and Examination No. 9081 was administered for the position

of policewoman. The examinations were virtually identical.

11. Thereafter, a job freeze was imposed upon the Police Department which was lifted in January, 1973. No policewomen or patrolmen were appointed between 1970 and 1973. However, on May 8, 1970, 125 trainees were appointed from the list established from Exam 9080 to fill 125 vacancies. These 125 trainees ripened into patrolmen during the freeze period. There were no new appointments after May 8, 1970 until January, 1973.

12. In January, 1973, the job freeze was lifted. Those qualified women on the eligible list from Exam No. 9081 were appointed at an accelerated rate. They were given the same duties, benefits and training as male officers. The median appointment date from Exam No. 9081 was July 30, 1973; the median date from Exam 9080 was October 1, 1973.

13. In February, 1973, separate budget lines for patrolmen and policewomen were eliminated.

14. The titles of policewoman and patrolman were merged into the title of police officer by order of the Police Commissioner effective April 23, 1973 for all purposes.

15. In December, 1973, a unisex exam for the position of police officer was administered. A single eligible list was established therefrom without regard to sex. Appointments were made in list order.

16. The named plaintiffs, Acha and Egan, were appointed on May 29, 1973 and June 25, 1973, respectively.

They filed complaints in the State Division of Human Rights and the EEOC in June, 1975.

17. Plaintiff class members Kripinski and Horneck were appointed to the Police Department on September 27, 1974. The transcripts from their hearings before the Special Master indicate that both had been offered appointments prior to that date. Ms. Kripinski was offered appointment in April, 1973 but withdrew her name from consideration at that time. Ms. Horneck was offered appointment in January, 1973 which she declined.

Neither Kripinski nor Horneck filed charges with the EEOC.

18. Appointments from eligible lists established from separate male exams do not constitute separate discriminatory acts. The Civil Service Law requires that appointments be made from eligible lists established from competitive examinations. Therefore, the only possible discriminatory act occurred when women were excluded from participating in those exams, not when appointments were properly made therefrom.

19. The affidavit of Maureen Kempton alleging that she received an identification card in May, 1973, entitled "Policewoman" is an attempt to exact form over substance. She does not allege that her position entailed duties different from that of male police officers. Female police officers were, of course, required to perform matron duty, pursuant to law. Similarly, male officers were required to search and guard male prisoners.

The fact that Maureen Kempton bid against other women for vacation choice was solely the result of the need to have matron coverage at the various precincts. Plaintiffs' complaint does not challenge as discriminatory the duties and assignments of female police officers.

20. To the extent that the affidavits of Mr. Gordon and Ms. Kempton allege post-1975 discrimination based upon matron duty assignments and refer this Court to a finding of "probable cause" issued by the City Commission on Human Rights, such allegations have no bearing on whether or not the layoffs in June, 1975 were discriminatory. Furthermore, we respectfully refer this Court to the petition and decision in *Crowe* v. *Codd*, Index No. 7796/76 (Sup. Ct. N.Y. Co., Oct. 28, 1976) (Sutton, J.), previously submitted under cover letter dated May 12, 1977.

21. Mr. Gordon's allegations concerning the tie-breaking procedures *applied by all City* agencies are not part of the complaint in this action and have no bearing on whether the layoffs were discriminatory. The tie-breaking procedures did not adversely affect any class member in the layoffs. Furthermore, the recall list has been adjusted to reflect the amended tie-breaking procedure. See affidavit of Paul Brennan submitted herewith.

22. As indicated earlier, plaintiffs have never, until this motion, contended that the layoffs were anything other than the result of the proper application of Section 80 of the Civil Service Law to the position of police officer. The allegation in Mr. Gordon's affidavit that the Police

Commissioner improperly chose to merge the lists solely for the purpose of the layoffs is neither part of this action nor is it substantiated by any competent evidence in the record. Again, an attorney's affidavit is not sufficient to place a fact in dispute upon a motion for summary judgment.

23. Plaintiffs' contentions throughout their memorandum that defendants engaged in and continue to engage in a purposive pattern and practice of sex discrimination are similarly not raised in the complaints and are unsubstantiated in the record.

WHEREFORE, it is respectfully submitted that defendants' instant motion should be granted in its entirety.

Dated: New York, New York
July 13, 1977

Judith A. Levitt
JUDITH A. LEVITT

Sworn to before me this
13th day of July, 1977.

Paul L. Brennan
Notary Public

PAUL L. BRENNAN
Notary Public, State of New York
No. 52-0406480
Qualified in Suffolk County
Commission Expires March 30, 1978

# Defendants' Reply Affidavit of Paul L. Brennan

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BERALDINE L. ACHA and ARLENE M. EGAN, each individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

ABRAHAM D. BEAME, individually and in his capacity as Mayor of the City of New York, MICHAEL J. CODD, individually and in his capacity as Police Commissioner of the New York City Police Department, and THE CITY OF NEW YORK, as a public employer,

Defendants.

AFFIDAVIT

75 Civ. 3128
(KTD)

STATE OF NEW YORK )
: ss:
COUNTY OF NEW YORK)

PAUL L. BRENNAN, being duly sworn, hereby deposes and says:

1. I am a Lieutenant in the New York City Police Department, currently assigned as an attorney in the Legal Division, and one of the attorneys for the defendants herein. I submit this affidavit in reply to the plaintiffs' opposition to the defendants' motion pursuant to Rules 56 and 60 of the Federal Rules of Civil Procedure. I make this affidavit from my own knowledge or from records of the Police Department.

2. The plaintiffs' contend (See affidavit of Maureen Kempton of July 7, 1977) that the defendants' vacation policy discriminates against the class members. The defendants' vacation policy (See Exhibit "A" annexed) is based on accomodation of the desires of the uniform personnel consistent with the Department's needs to maintain its ability to provide necessary services in a wide variety of functions. Some functions can only be performed by a limited class of police officers and, in those cases, the needs of the Department must take precedence. Among these functions are those dealing with the security of female prisoners and female material witnesses which can only be performed by female police officers, and therefore, it is incumbent on the Department to maintain a minimum level of availability of female police officers.

3. Moreover, vacation selection by females only among other females will most often inure to their benefit. As pointed out by the plaintiffs, all class members, and more than 50% of the Department's female officer complement, were hired since 1973 and, therefore, would generally have a seniority disadvantage if they were required to select vacations with male police officers.

4. The plaintiffs also contend (See Affidavit of Murray A. Gordon of July 8, 1977) that the Police Department began appointing women in or about February, 1973, but then on a ratio of four men to one woman; that this ratio reflected the number of lists then in existence; and that the ratio "resulted, in many cases, in men being appointed earlier than women who received higher grades on similar or identical examinations."

5. During the period from May 8, 1970 until January 29, 1973, there were no new hires in the Police Department. The maturation of trainees into police officers was not new hirings, contrary to the contention of the plaintiffs' attorney (See Gordon affidavit, paragraphs 7 & 8).

6. When hirings resumed in January, 1973, there were then eight eligible lists in existence, from which appointments could be made, which included over 24,000 eligibles. They are set forth below together with the dates the tests resulting in those lists were administered, and the number of candidates who passed (where available)

| Exam. No. | No. of Passers | Date Administered |
|---|---|---|
| 7065 | | 5/11/68 |
| 8046 | | 7/20/68 |
| 8108 | | 1/18/69 |
| 9019 | 3427 | 4/5/69 |
| 9049 | 2682 | 9/2/69 |
| 9080 | 6826 | 10/25/69 |
| 9081 | 1727 | 10/25/69 |
| 0013 | 4569 | 8/24/70 |

7. No appointments had been made from the lists resulting from Exam. Nos. 9019, 9049, 9080, 9081 and 0013 prior to May 8, 1970 and, on that date, 125 eligibles were appointed as Trainees (males), most of whom matured into police officers during the freeze period. No further appointments to the position of Trainee have been made since May 8, 1970.

8. The following chart indicates the number of appointments from each list during the calendar year 1973:

| | Examination No. | | | | |
|---|---|---|---|---|---|
| Date | 9019* | 9049* | 9080 | 9081 | 0013 |
| 1/29/73 | 0 | 0 | 0 | 6 | 0 |
| 2/26/73 | 3 | 0 | 0 | 20 | 0 |
| 3/26/73 | 2 | 0 | 0 | 18 | 0 |
| 4/30/73 | 18 | 2 | 0 | 19 | 0 |
| 5/29/73 | 16 | 0 | 0 | 108 | 0 |
| 6/25/73 | 17 | 61 | 0 | 56 | 0 |
| 7/30/73 | 8 | 5 | 80 | 71 | 0 |
| 8/31/73 | 11 | 10 | 179 | 63 | 0 |
| 10/1/73 | 9 | 8 | 120 | 28 | 261 |
| 10/29/73 | 4 | 4 | 100 | 41 | 210 |
| 11/19/73 | 4 | 8 | 70 | 22 | 108 |
| 12/17/73 | 8 | 4 | 49 | 26 | 74 |

9. During this period, appointments were highly accelerated so that rigid adherence to preference to Exam. No. and List No. was not possible. The preference was generally adhered to with respect to assigning the applications for investigations, except that priority was given to minority applicants from the earlier lists and to females.

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* These appointments do not include those with preferences or those who were no longer in the Department in June, 1975.

Certifications and appointments were made, roughly, every 30 days, of those eligibles whose investigations had been successfully completed.

10. As can be seen from the statistics, 227 females were appointed from List No. 9081 before any males were appointed from the companion list No. 9080 (except for the 125 Trainees appointed on May 8, 1970), and that many females were appointed before males on earlier lists. The entire female list had been canvassed, and most appointments made prior to any appointments from the next eligible list. Additionally, 35 females were appointed during the calendar year 1974, but these were, for the most part, eligibles who had declined earlier appointment, or who had significant problems with their investigations.

11. Preferences on eligible lists are established by the New York State Civil Service Law, and the plaintiffs, at this stage, have not challenged its constitutionality with respect to that issue.

12. In no case of which I am aware was the tiebreaker policy of the Department of Personnel brought into play to determine whether any of the police officers laid off on June 30, 1975 were eligible to be retained pursuant to Section 80 of the Civil Service Law. As soon as it came to the attention of the defendants that the system of breaking ties would adversely impact on the relative position of any woman on the preferred list who had been appointed on the same date as a man who had taken Exam. No. 9080,

given the same date as the female Exam. No. 9081, or Exam. No. 0013, given on a later date, steps were taken to change the system. The current system, employing the date of examination instead of the date of establishment of the list, has no such adverse impact. The old system had never been used for purposes of reappointment. If anything, the response of the defendants to the infirmity of the prior system was an indication of good faith, rather than the "animus" attributed to them by the plaintiffs' attorney.

13. Identification cards issued by the Police Department before 1974 all carried an expiration date of December 31, 1973. Because of various administrative delays, no new cards were issued until January, 1975. The implementation of a change of this magnitude, involving 30,000 members of the uniform force, is brought about by preparing the new card for each member as that member appears at the Outdoor Pistol Range for his or her annual mandatory firing cycle, where photographs and measurements can be taken expeditiously with the least disruption to the orderly functioning of the Department. The changeover, initiated in January, 1975, was carried out in this manner, and the new cards bear an expiration date of December 31, 1978.

During interim periods, new cards are only issued to new employees, promoted employees, or to replace cards that have been lost or destroyed. The title, "Police Officer," on the identification cards, was first used with the new series beginning in 1975. Certainly, no discriminatory purpose can be attributed to this procedure.

/s/

PAUL L. BRENNAN

Sworn to before me this
[illegible] day of July, 1977

# Special Master's Fifth Interim Report

## PRELIMINARY STATEMENT

The Fifth Interim Report is limited to the issue of seniority with respect to the following seven claimants:

MARY JANE STAGNO
MARIE FINAMORE
PATRICIA McDERMOTT
NANCY HOWELLS
MAUREEN BURKE
KATHLEEN P. EGAN
CAROL S. KRANICK

A Report covering the issue of back pay with respect to those claimants will be submitted at a later date.

The general findings contained at Pages 3 and 4 of my Interim Report dated January 17, 1977, as modified in the Preliminary Statement of my Second Interim Report dated March 18, 1977, also apply to this Fifth Interim Report.

## MARY JANE STAGNO

MARY JANE STAGNO was born on January 7, 1949, was appointed a Policewoman in The New York City Police Department on May 29, 1973, was laid off on or about July 1, 1975 and has not been reinstated (Tr. 4524-5).

Claimant was married on April 24, 1970, and has two children, born on March 29, 1971 and March 17, 1972 (Tr. 4526). She graduated from high school in June, 1966 and received a driver's license in 1969, which was prior to her 21st birthday (Tr. 4525).

Claimant produced her high school yearbook which stated her ambition: "to become a policewoman" under her picture (Tr. 4527). She testified that after graduation from high school she read The Chief to which her father subscribed and that she "constantly bothered" her father, a housing police officer, to get information for her to take a Police examination (Tr. 4527-8).

Moreover, in early 1969, claimant went to take a Patrolman's examination for which she had previously made application but was refused admittance (Tr. 4528-9, 4554). She stated that the Lieutenant who was at the school informed her that he would send an application for the next Policewoman's examination to her (Tr. 4530). Claimant submitted a form letter with a facsimile signature which in substance stated that in view of her interest, the Police Department had taken the liberty of filing an application on her behalf for the upcoming Policewoman's examination (Tr. 4530-1, STAGNO Ex. 1).

In addition, claimant testified that she called the 122nd Precinct after her graduation from high school in 1966 until 1969 and that she made inquiries about the Trainee examination (Tr. 4531-2).

Examination No. 6127 for the position of Trainee was given on April 1, 1967. Examination No. 6127 was a walk in examination; the median appointment date from the eligibles list resulting therefrom was June 23, 1967 (DPF 15, 16).

If Examination No.6127 for Trainee was not limited to men, claimant would have been eligible to take that examination, was qualified for appointment to the Police Department, and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of June 23, 1967.

## MARIE FINAMORE

MARIE FINAMORE was born on February 11, 1946, was appointed a Policewoman in The New York City Police Department on May 29, 1973, was laid off on or about June 30, 1975 and has not been reinstated (Tr. 4572).

Claimant was married on June 10, 1972, and has three children, twins born in August, 1975, and another child born on December 12, 1976 (Tr. 4573). She graduated from high school in June, 1963, and obtained her driver's license when she was 18 years old (Tr. 4572).

Claimant testified that she always wanted to become a Police Officer and that after she graduated from high school, she called to inquire about the 1964 Policewoman's examination and about the Trainee examination (Tr. 4573-4). She was told that she was too young to take the Policewoman's examination and that the Trainee examination was only open to men (Tr. 4574). Her husband corroborated this testimony and the testimony that she had made inquiries as to the availability of positions in the Police Department from his father who was a Police Officer assigned to Brooklyn Headquarters (Tr. 4574, 4597-8).

In 1965, after learning that DANIEL FINAMORE, who subsequently became her husband, was going to take the Trainee examination, claimant again called the Department of Personnel and the Police Academy (Tr. 4574). DANIEL FINAMORE testified that he took the Trainee examination in January or February of 1965 (Tr. 4603). In addition, in 1967, claimant studied for a Patrolman's examination with her cousin, ISIDORE VOLPE (Tr. 4576, 4607-8).

Examination No. 1215 for the position of Trainee was given on January 16, 1965; the filing period for that examination was from November 4, 1964 through November 30, 1964. The median appointment date from the eligibles list resulting therefrom was October 29, 1965 (DPF 15, 16).

If Examination No. 1215 for Trainee was not limited to men, claimant would have been eligible to take that examination, was otherwise eligible for appointment and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of October 29, 1965.

## PATRICIA McDERMOTT

PATRICIA McDERMOTT was born on October 13, 1946, was appointed a Policewoman with The New York City Police Department on October 29, 1973, was laid off on June 30, 1975, and has not been reinstated (Tr. 5954-5).

Claimant is unmarried and has no children (Tr.5944-5). She graduated from high school in June, 1964, and obtained a driver's license in 1964 or 1965 (Tr. 5989,5994).

Claimant testified that she first became interested in a career with the Police Department in 1963 or 1964 (Tr. 5955-6). She stated that she discussed her interest with a Policeman who lived in her building and with her father and Uncles (Tr. 5956-7, 5983-4). She further stated that both she and her father read The Chief, looking for upcoming examinations (Tr. 5958, 5982-9).

In addition, claimant stated that in July or August, 1964, she twice inquired in person at the Department of Personnel concerning the availability of examinations for Policewoman (Tr. 5958-9). She further claimed to have borrowed an Arco book for Patrolman-Police Department from a girl friend in 1964 or 1965 to prepare herself for the next available Police Officer's examination and that she studied from the same book in 1969 (Tr. 5960-1, 5972-3). The girl friend was not called to testify. Moreover, she asserted that in 1965 an Uncle, who was not called to testify, constructed a gymnasium for her in the basement of her home, which she used to exercise to keep in shape in preparation for the Police Department examination (Tr. 5957-8, 5983).

Based upon my observation of the demeanor of claimant and her witnesses, their possible bias, the accuracy of their recollection and the substance of their testimony, I do not find their testimony to be credible. Accordingly, I find that claimant is not entitled to an earlier seniority date than the one she now has.

## NANCY HOWELLS

NANCY HOWELLS was born on June 27, 1941, was appointed a Policewoman in The New York City Police Department on May 29, 1973, was laid off on July 1, 1975 and has not been reinstated (Tr. 6354).

Claimant is married and has one child who was born on July 21, 1975 (Tr. 6354). She obtained a high school diploma in June, 1959 and a driver's license in 1963 (Tr. 6355).

Claimant testified that she first became interested in becoming a Police Officer in 1957 when she was sixteen years old (Tr. 6355). She further testified that, thereafter, specifically between June of 1962 when she became 21 and April, 1963, she called the 24th Precinct and the Department of Personnel to inquire about the availability of positions with the Police Department (Tr. 6356). She was told that there were no examinations scheduled for women (Tr. 6357).

In addition, claimant stated that she attended school in Mexico and that after her return, she discovered through her reading of The Chief, that she had missed an examination (Tr. 6358). I do not find this testimony to be credible.

Claimant also testified that, thereafter, she called the Department of Personnel every few months to inquire about future examinations (Tr. 6359, 6363).

Further, claimant stated that she went down to the Department of Personnel and filled out numerous Request for Employment Application Cards for the position of Policewoman (Tr. 6359, HOWELL's Exs. 1, postmarked 9/23/68, and 2).

Examination No. 8108 for the position of Patrolman was given on January 18, 1969. The filing period for that examination was from November 25, 1968 to January 6, 1969 and the median appointment date for the eligibles list resulting therefrom was January 29, 1973 (DPF 15, 16).

If Examination No. 8108 was not limited to men, claimant would have been eligible to take that examination, was otherwise qualified for appointment, and would have accepted such appointment.

Consequently, I find that claimant should be granted a seniority date of January 29, 1973.

## MAUREEN BURKE

MAUREEN BURKE was born on April 14, 1946, was appointed a Policewoman in The New York City Police Department on June 25, 1973, was laid off on July 1, 1975, and has not been reinstated (Tr. 6453-4).

Claimant has never been married and has no children (Tr. 6453). She obtained a high school diploma in June, 1963, and a driver's license in September, 196[illegible] (Tr. 6453).

Claimant testified that after a discussion with a Policewoman who visited her high school on career day, she "knew that that's what (she) wanted" (Tr. 6455). The only witness who testified on claimant's behalf was her father who stated that she told him about a career program at her school during her junior year which made her decide"that she definitely wanted to be a Policewoman" (Tr. 6470).

In addition, claimant testified that when she learned that a Policewoman's examination was being given in 1964, she went to the 109th Precinct in Queens to pick up an application for her sister. She stated that although she also was interested in taking that examination, she was told that she was too young (Tr. 6456-7).

Thereafter, claimant stated she started following The Chief, looking for the next examination and that she called the Employment Section a few times (Tr. 6458). Although claimant stated that during the period that she worked for the Children's Aide Society she would have taken a Trainee position (Tr.6459), there was no testimony or other evidence that she was aware of the existence of that position during that time.

Based upon my observation of the demeanor of claimant and her witness, their possible bias, the accuracy of their recollection and the substance of their testimony, I do not find their testimony to be credible. Accordingly, I find that claimant is not entitled to an earlier seniority date than the one she now has.

## KATHLEEN P. EGAN

KATHLEEN P. EGAN, was born on July 24, 1945, was appointed a Policewoman in The New York City Police Department on June 25, 1973, was laid-off on July 1, 1975 and has not been reinstated (Tr. 6475).

Claimant has never been married and has no children (Tr. 6475). She obtained a high school diploma in June, 1963, and a driver's license in 1964 (Tr. 6475, 6481).

Claimant testified that she first became interested in becoming a Police Officer in high school when she watched the television show, "Decoy" (Tr. 6476). She also stated that she would have taken the 1964 Policewoman's Examination but that she was not old enough (Tr. 6479).

In addition, claimant stated that she read The Chief, called The Chief and called The Department of Personnel to find out when the next Policewoman's examination would be given (Tr. 6478-9).

Claimant's father testified that his daughter read The Chief and that he remembered that she made phone calls to find out about Police examinations (Tr. 6512-3, 6519). A friend of claimant's father, who had been a Police Officer in The New York City Police Department for 19 years, gave vague testimony to the effect that claimant had told him "she wanted to be a cop" and discussed her interest in becoming a Police Officer with him (Tr. 6504-5).

Based upon the demeanor of claimant and her witnesses, their possible bias, the strength and accuracy of their recollection, and the substance of their testimony, I do not find their testimony to be credible. Accordingly, I find that claimant is not entitled to an earlier seniority date than the one she now has.

## *CAROL S. KRANICK

CAROL S. KRANICK was born on January 6, 1949, was appointed a Policewoman in The New York City Police Department on May 29, 1973, was laid off on or about June 30, 1975, and was erroneously reinstated on August 13, 1976.

Claimant has never been married and has no children. She graduated from high school in June, 1967 and received a driver's license on May 21, 1968.

Claimant testified that she first became interested in becoming a Police Officer during her senior year in high school when she watched television shows about the police and discussed her interest with the housing police at the housing project at which she lived. In addition, she stated that she discussed her interest with her family and her girl friend, ROSALYN YELLEN, and read The Chief. Indeed, it was asserted that claimant convinced her friend, ROSALYN, to take the 1969 Policewoman's examination.

Claimant stated that she imagined that she knew that the Trainee position existed in 1967 and 1968 but was not certain of that fact.

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*The hearing relating to this claimant was held on July 11, 1977, the date of this Report. Although a stenographer was present, the transcript was not available at the time of writing this Report. Accordingly, no transcript references are given.

It is unfortunate that claimant was erroneously reinstated in August, 1976. Nonetheless, based upon my observation of the demeanor of claimant and her witnesses, their possible bias, the accuracy of their recollection, and the substance of their testimony, I do not find their testimony to be credible. Accordingly, I find that claimant is not entitled to an earlier seniority date than May 29, 1973.

## CONCLUSION

The claims of the following should be allowed to the extent indicated above:

MARY JANE STAGNO

MARIE FINAMORE

NANCY HOWELLS

The claims of the following should be denied for the reasons set forth above:

PATRICIA McDERMOTT

MAUREEN BURKE

KATHLEEN P. EGAN

CAROL S. KRANICK

Dated: New York, New York
July 11, 1977

Respectfully submitted,

RENEE J. ROBERTS
Special Master

# Rebuttal Affidavit of Murray A. Gordon

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-------------------------------------------x

BERALDINE L. ACHA and ARLENE M. EGAN, each individually and on behalf of all others similarly situated, :

Plaintiffs, :

-against- :

ABRAHAM D. BEAME, individually and in his capacity as Mayor of the City of New York, MICHAEL J. CODD, individually and in his capacity as Police Commissioner of the New York City Police Department, and THE CITY OF NEW YORK, as a public employer, :

Defendants. :

-------------------------------------------x

REBUTTAL
AFFIDAVIT

75 Civ. 3128
(KTD)

STATE OF NEW YORK )
COUNTY OF NEW YORK) ss.:

MURRAY A. GORDON, being duly sworn, deposes and says:

1. I am a member of the firm of Murray A. Gordon, P.C., attorneys for plaintiffs in the above-entitled action, and I submit this affidavit as a rebuttal to the reply affidavits of Judith Levitt and Paul L. Brennan in the above-entitled action.

2. The reply affidavits suggest that the affidavit of counsel for plaintiffs was inappropriate in a motion for summary judgment. This contention is made, ironically enough, in affidavits of the Assistant Corporation Counsel representing the defendants and Lt. Brennan, who has been permitted to act as

co-counsel for the defendants. In any event, the matters contained in my affidavits upon the present motions are predicated upon matters of record, analysis of data provided by the defendants to our office, and matters of which the Court can take judicial notice. The computer print-outs upon which much of the data contained in my affidavit dated July 8, 1977, and in this affidavit, is based, are too bulky to be reproduced and annexed hereto. However, this material can be produced, if requested, at the hearing scheduled herein. Moreover, the defendants have failed to point to any particular allegation of fact contained in my affidavit which is vulnerable by reason of my status as counsel or which is nor otherwise substantiated by matters which constitute competent evidence.

3. It is further asserted in the affidavit of Ms. Levitt, as well as in the Memorandum of Law submitted by the defendants ("DML"), that the allegation made by the plaintiffs that the lay-offs were purposely and intentionally discriminatory in nature, is new and was not previously asserted. Reference to the amended complaint and to prior Memoranda of Law submitted by plaintiffs makes it clear that it was at all times contended by plaintiffs that the lay-offs were in violation of §1983 and the Fourteenth Amendment as well as Title VII, thus implicating purposeful and intentional discrimination in the lay-offs. Throughout this litigation, and particularly with reference to the claims made by the defendants that the suit was not timely commenced, plaintiffs have asserted and repeated that the crux

of this litigation is the lay-offs of June 30, 1975. And in paragraph "36" of the amended complaint it was specifically alleged, after repeated reference in the complaint to the lay-offs, "that the discrimination based on sex in all of the foregoing respects was not justified by any business necessity or any proper or lawful cause". The pleadings here, therefore, have expressly indicated that the lay-offs constituted an act of discrimination; and the particular allegation in paragraph "36" indicates that it has been the position of the plaintiffs that such lay-offs, quite apart from their relationship to the earlier patterns of discrimination in hiring, were discriminatory in that there was a disparity not justified by business necessity or the seniority system which was utilized.

4. It would, in any event, be inappropriate to grant defendants summary judgment on the present state of the record as to the discriminatory purposes and intent of the lay-offs. There has never been an opportunity here to conduct discovery proceedings or hearings on all of the circumstances surrounding the lay-offs. Following the denial of the motion for a preliminary injunction, the Court of Appeals so disposed of the issue of the effect of the seniority system herein, as to make it unnecessary to deal with any issue of purpose or intent in the lay-offs. The hearings mandated by the Court of Appeals and this Court dealt only with the issue of individual victimization and there has, therefore, been no opportunity, by way of discovery or

or hearings, to try out the issue whether the lay-offs were discriminatory in purpose or intent independently of prior patterns of discrimination. In such circumstances it would be wholly inappropriate to grant defendants summary judgment at this juncture, before any discovery or other hearing process, where the principal facts relevant and material to the foregoing issue of discriminatory purpose or intent in the lay-offs are mainly within the possession and control of the defendants. Rule 56(f), Fed. R.Civ.P.

5. Even if the defendants' summary judgment motion is to be decided at this time, in our view the evidence already of record, referred to in my earlier affidavit upon the instant motion, amply justifies the denial of summary judgment and adherence to the earlier determinations of the Court of Appeals and this Court herein.

6. In this connection, and since my earlier affidavit, there has come to my attention, a computer print-out prepared by the Comptroller of the City of New York, dated June 30, 1975, which establishes even more conclusively then heretofore indicated that the positions of Patrolman and Policewoman were separate titles on June 30, 1975, the very day on which they were treated as single titles for lay-off purposes. We are handing up simultaneously herewith the entire print-out for viewing by this Court. I am attaching, as Exhibits "A", "B" and

"C", respectively, photostatic copies of pages "1", "56" and "58" of the print-out. It will be noted that Patrolman and Policewoman titles are set out as separate and distinct titles. A separate title code is assigned to each of these two titles, indicating that these titles are deemed separate and distinct for payroll purposes. And it will also be observed that there are differences in the union code of the two titles which reflect the differential in ranks in each of the titles.*

7. In the light of this documentation it is clear that the assertions of the defendants, in their briefs and affidavits, that the titles of Patrolman and Policewoman were merged into a single title prior to the lay-offs, are misleading at the least and most likely just false.

8. Other errors of a comparable order of magnitude appear in the reply affidavits submitted by defendants upon the instant motions. Thus a substantial portion of the most recent affidavit of Lt. Brennan is devoted to demonstrating that the appointments which were made when hirings were resumed in January, 1973, were fair and nondiscriminatory as far as women were concerned. Brennan affidavit ¶¶4-10. In ¶ "6" of his affidavit he lists eight examinations from which hirings took place commencing January, 1973. But in ¶¶ 7-10, reference is made to appointments from only five of the lists. The three lists omitted

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*This printout squarely refutes defendants' representations that separate budget lines for the positions of Patrolman and Policewoman were eliminated in February, 1973. Affidavit of Michael J. Codd dated June 15, 1977, ¶6; Defendants' Rule 9(g) statement dated June 15, 1977, ¶18.

are all lists exclusively of men. Consequently, the number and dates of the appointments referred to in ¶¶"8", "9" and "10" are wholly misleading because they do not reflect the men appointed off the three lists not referred to.

9. In addition, Brennan's affidavit has apparently omitted any reference to the appointments made of male candidates with veterans preference, from lists established from Exams 9019 and 9049.

10. From our analysis of the computer print-out provided to us by the defendants, a correct chart of the approximate number and dates of appointments during the calendar year 1973 would read as follows (all appointments, other than those resulting from Exam 9081, were of men only):

Examination No.

| Date | 7065* | 8046* | 8108* | 9019* | 9049* | 9080** | 9081** | 0013** | Other*** Lists |
|---|---|---|---|---|---|---|---|---|---|
| 1-29-73 | 37 | 16 | 41 | 0 | 0 | 0 | 6 | 0 | 0 |
| 2-26-73 | 27 | 9 | 111 | 15 | 0 | 0 | 20 | 0 | 2 |
| 3-26-73 | 10 | 10 | 41 | 17 | 0 | 0 | 18 | 0 | 1 |
| 4-30-73 | 2 | 4 | 20 | 59 | 2 | 0 | 19 | 0 | 4 |
| 5-29-73 | 3 | 1 | 16 | 49 | 0 | 0 | 108 | 0 | 5 |
| 6-25-73 | 12 | 2 | 25 | 64 | 169 | 0 | 56 | 0 | 1 |
| 7-30-73 | 4 | 0 | 15 | 21 | 13 | 80 | 71 | 0 | 1 |
| 8-31-73 | 10 | 5 | 16 | 25 | 25 | 179 | 63 | 0 | 3 |
| 10-1-73 | 1 | 0 | 0 | 21 | 19 | 120 | 28 | 261 | 15 |
| 10-29-73 | 1 | 1 | 0 | 16 | 12 | 100 | 41 | 210 | 10 |
| 11-19-73 | 0 | 0 | 0 | 10 | 11 | 70 | 22 | 108 | 8 |
| 12-17-73 | 4 | 1 | 0 | 11 | 8 | 49 | 26 | 74 | 210 |

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*Figures for these lists do not include males who received preferences other than veterans preference, or who left the Department prior to June 30, 1975. In many instances, therefore, the number of males appointed from those lists may be even greater than indicated herein.

**Plaintiffs are relying upon the figures given in ¶8 of the Brennan affidavit for these figures which purport to be accurate.

***This list includes males appointed on the indicated date who, as appears from the preferred list, were not appointed from any of the lists enumerated above.

The cited omissions in the table as presented by defendants are critical, as the above-corrected table indicates. The corrected table demonstrates that on all but two of the twelve appointment dates cited by defendants, less than 20% of all appointees were women. Overall, approximately 16% of all appointments made on these dates were of women.

11. The pattern is even more dramatic if one considers the entire pattern of appointments on or after January 29, 1973 (after Title VII was applicable to defendants): 4,236 males and only 513 females were appointed to the Department. (See ¶23 in both the complaint and the amended complaint, which was not denied in defendant's answer). Thus, during the period that defendants now claim they were not discriminating against women, less than 11% of all persons appointed PD were female, although, as defendants concede, approximately one-quarter of all persons taking PD exams in October of 1969 and in December of 1973 (when women were admitted to the examinations) were female. (Affidavit of Cornelius J. Behan dated June 27, 1975, ¶12).

12. Defendants argue that the instant action is time-barred, as no class member filed a complaint within 300 days of her date of hire, which defendants claim is the last date upon which a class member may allege discrimination. (DML at 9). For reasons set out in greater length in our Memorandum of Law dated July 8, 1977, this argument is fallacious. However,

even granting defendants' premise, their claim that this action is time-barred must fail in light of newly discovered evidence. Following the renewal of defendants' motion for summary judgment, our office made inquiries as to whether any class member had filed charges with the Equal Opportunity Commission ("EEOC"). On July 13, 1977, our firm was notified by the EEOC that Alice McCain, a class member filed charges with the EEOC in September of 1973, alleging discrimination based on sex in the PD's hiring practices. That charge is still pending before the EEOC. Based upon advice our office has received from the EEOC, matters included in the EEOC investigation of the McCain charge included the same prior discriminatory hiring practices cited in the instant action. Ms. McCain has authorized our firm to obtain a right to sue letter from the Department of Justice, to institute an action in this Court on her behalf and on behalf of all other similarly situated women in the PD (which would, at a minimum, include all women hired by the PD no earlier than 300 days prior to the date her charge was filed with the EEOC, including about 90% of the present class), and to move to consolidate her case with the present action. We intend to take these actions as expeditiously as possible. We respectfully request that if this Court finds defendants' defense of the statute of limitations pursuant to Title VII to be convincing, that it defer a decision on this issue until such time as this Court may consider the effect of the charge filed by class member McCain. For if her charge was timely for purposes of Title VII, then, even if *Evans* is otherwise applicable, that timeliness accrues for the entire class since if any member of the class filed a timely charge it is irrelevant that others did not [*Franks v. Bowman Transportation Co.*, 424 U.S. 747, 752-757, 770-779 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 407, 423-425 (1975); *Moss v. Lane Co.*, 471 F.2d 853, 855-856 (4th Cir. 1973)],particularly at this stage of the litigation [*East Texas Motor Freight, Inc. v. Rodriguez*, 45 U.S.C.W. 4524, 4527 n.12 (U.S.S. Ct. May 31, 1977)].

MURRAY A. GORDON

Sworn to before me this
19th day of July, 1977.

Peggy Beckwith
Notary Public

PEGGY BECKWITH
Notary Public, State of New York
No. 60-4624885
Qualified in Westchester County
Term Expires March 30, 1978

Exhibit A to Rebuttal affidavit of Murray a. Gordon

A 579

06-30-75

CITY-WIDE EXECUTIVE DUES CHECK-OFF
ALPHABETIC REGISTER OF TITLES AND UNIONS

| NEW ADDITION | TITLE DESCRIPTION | UNION DESCRIPTION | TITLE CODE | UNION CODE |
|---|---|---|---|---|
| | ABLE SEAMAN | NMU | 91501 | EE<br>EH<br>FJ |
| | ACCOUNT CLERK | DC 37 | 08008 | FD<br>YH |
| | ACCOUNT CLERK | DC 37 | 10105 | FD<br>FN<br>JA<br>JX |
| | ACCOUNTANT | DC 37 | 08600 | UC |
| | ACCOUNTANT | DC 37 | 40510 | HR<br>JA<br>JX<br>UC |
| | ACCOUNTANT (EFA) | DC 37 | 00140 | UC |
| | ACTUARY | DC 37 | 40710 | UC |
| | ADDICTION AIDE | DC 37 | 02549 | HM<br>HR |
| | ADDICTION COUNSELOR | DC 37 | 00055 | HM<br>HN<br>HT |
| | ADDICTION SERVICES EDUCATION SPECIALIST | DC 37 | 02261 | HP<br>HR |
| | ADDICTION SPECIALIST | DC 37 | 56070 | HM<br>HN<br>HP<br>HR |
| | ADDICTION SPECIALIST (METHADONE) | DC 37 | 56071 | HM<br>HN<br>HR |
| | ADMINISTRATIVE AIDE | DC 37 | 10134 | JX |
| | ADMINISTRATIVE ASSOCIATE | CWA | 08970 | OJ |
| | ADMINISTRATIVE ASSOCIATE | CWA | 10130 | OJ |
| | ADMINISTRATIVE ASSOCIATE (BD OF ELECT) | CWA | 94206 | FR |

Exhibit B to rebuttal affidavit of Murray A. Gordon

| NEW ADDITION | TITLE DESCRIPTION | UNION DESCRIPTION | TITLE CODE | UNION CODE |
|---|---|---|---|---|
| | PARK WORKER (EEA-W) | DC 37 | 03556 | BP |
| | PARKING ENFORCEMENT AGENT | CWA | 71612 | CS |
| | PARKING METER COLLECTOR | DC 37 | 41110 | FN |
| | PATHOLOGIST | DC | 53310 | HJ |
| | PATIENT AIDE (CETA) | DC 37 | 00230 | AH |
| * | | | | HM |
| * | | | | HR |
| * | | | | YH |
| | PATIENT AIDE (EEA) | DC 37 | 00162 | AH |
| | | | | HM |
| | | | | HR |
| | | | | YH |
| | PATIENT AIDE (EEA-6) | DC 37 | 03520 | AH |
| | | | | HM |
| | | | | HR |
| | | | | YH |
| * | PATIENT AIDE (WREP) | DC 37 | 00198 | AH |
| * | | | | HM |
| * | | | | HR |
| * | | | | YH |
| | PATROLMAN | PBA | 70210 | CJ |
| | | | | FA |
| | | | | FB |
| | | | | FC |
| | | | | GF |
| | | | | GJ |
| | | | | GL |
| | | | | GN |
| | | | | GT |
| | | | | GV |
| | | | | IC |
| | | | | IE |
| | | | | IF |
| | PAVER | PRB | 92420 | GM |
| | PEDIATRIC NURSE ASSOCIATE | DC 37 | 09151 | CK |
| | PERSONNEL ASSISTANT | CWA | 13715 | QJ |
| | PERSONNEL ASSOCIATE | CWA | 13730 | QJ |

Exhibit C to rebuttal affidavit of Murray A. Gordon

| NEW ADDITION | TITLE DESCRIPTION | UNION DESCRIPTION | TITLE CODE | UNION CODE |
|---|---|---|---|---|
| | PHYSICIAN (P/T-PEDIATRIC INSTR) | DC | 54711 | LL |
| * | PHYSICIAN ASSOCIATE | DC 37 | 00173 | LH |
| | PHYSICIAN'S ASSOCIATE | DC 37 | 52700 | LH<br>LI |
| | PHYSICIST | DC 37 | 22015 | HZ |
| | PILOT | MEBA | 70312 | FC<br>HC |
| | PIPE LAYING INSPECTOR | LOCAL 237 | 33415 | AC<br>EM |
| | PLACEMENT DIRECTOR | P S C | 04102 | DO<br>JB |
| | PLAN EXAMINER (BUILDINGS) | DC 37 | 22410 | HZ |
| | PLANNER | DC 37 | 22115 | HZ |
| | PLANNING & OPERATIONS OFFICER (CD) | CWA | 22113 | CJ |
| | PLASTERER | LOCAL 237 | 92235 | AC<br>EM<br>WW |
| | PLASTERING INSPECTOR | ABI | 33515 | MF |
| | PLAYGROUND ASSISTANT | DC 37 | 60405 | FO |
| | PLUMBING INSPECTOR | ABI | 33615 | MF |
| | PODIATRIST (P/T) | DC | 53011 | HJ |
| | POLICE ADMINISTRATIVE AIDE | DC 37 | 10144 | JX |
| | POLICE OFFICE ASSOCIATE (EEA-W) | DC 37 | 03558 | JY |
| * | POLICE OFFICE ASSOCIATE (CETA) | DC 37 | 03495 | JX |
| | POLICE OFFICE ASSOCIATE (EEA) | DC 37 | 03304 | JX |
| | POLICE TRAINEE | PBA | 70201 | CJ<br>FA |
| | POLICEWOMAN | PBA | 70211 | CJ<br>FA |

Opinion and Order of Hon. Kevin T. Duffy
of July 28, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--------------------------------------x

BERALDINE L. ACHA and :
ARLENE M. EGAN, each individually
and on behalf of all others :
similarly situated,
:
Plaintiffs,
: OPINION AND ORDER
-against-
: 75 Civ. 3128
ABRAHAM D. BEAME, individually
and in his capacity as Mayor of the :
City of New York, MICHAEL J. CODD,
individually and in his capacity :
as Police Commissioner of the
New York City Police Department, :
and THE CITY OF NEW YORK, as a
public employer, :

Defendants. :

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APPEARANCES:

MURRAY A. GORDON, P.C.
Attorney for Plaintiffs
By: Murray A. Gordon, Esq.
Kenneth E. Gordon, Esq.
Of Counsel

HONORABLE W. BERNARD RICHLAND
Corporation Counsel, City of New York
Attorney for New York City Officials
By: Judith Levitt, Esq.
Paul Brennan, Esq.
Of Counsel

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Amicus Curiae
2401 E Street, N.W., Washington, D.C. 20506
By: Lutz Alexander Prager, Esq.

KEVIN THOMAS DUFFY, D.J.

Plaintiffs' class, consisting of female New York City police officers who were laid off on June 30, 1975, have, to date, substantially succeeded in challenging the hiring practices of the New York City Police Department ("N.Y.P.D.") as violative of Title VII, 42 U.S.C. § 2000e *et seq.* In the wake of the Supreme Court's rulings in *International Brotherhood of Teamsters* v. *United States*, 45 U.S.L.W. 4506 (May 31, 1977) and *United Airlines, Inc.* v. *Evans*, 45 U.S.L.W. 4566 (May 31, 1977), the City of New York, its Mayor and its Police Commissioner, have renewed their motion for summary judgment, previously denied, dismissing this action. A brief review of the facts giving rise to this suit[1] and of the suit itself is necessary for an understanding of the motions.

I.

Prior to January 1973, men, but not women, were eligible for the positions of "patrolman" and, for those men under the age of 21, "police trainee;" women were eligible only for the position of "policewoman." The N.Y.P.D. administered examinations for the policewoman position on March 21, 1964, Test No. 9986, and October 25, 1969, Test No. 9081. Between the dates of these two policewoman examinations, seventeen examinations were given for the patrolman and/or police trainee slots. Although no new uniformed officers, male or female, were hired from mid-1970 until 1973, by December 28, 1972, there were 25,210 members of the force, only 282 of whom were women. The low number of women was the product of an alleged official limitation which prevented the percentage of women from exceeding 1.34% of the total uniformed force.

Sometime in 1972, the Department, which had previously assigned policewomen primarily to matron-like functions, began to assign females to patrol duties. On April 24, 1973, then Police Commissioner Patrick V. Murphy ordered the merger of the separate categories of "patrolman" and "policewoman" into that of "police officer" and, thereafter, the identical height and weight requirements were imposed upon each sex. The plaintiffs assert that the official quota upon women members of the police force was not eliminated but was modified so that for every four men hired, one woman was hired. By June 1975, the percentage of women in the force rose to 2.62%.

Beginning in late May 1975, the N.Y.P.D. sent notices to over 5,000 police officers informing them that they would be terminated for budgetary reasons as of June 30, 1975. On June 25, Beraldine L. Acha and Arlene

M. Egan, the named plaintiffs, filed charges with the New York City Human Rights Commission and the United States Equal Employment Opportunity Commission ("E.E.O.C.") alleging that the proposed terminations would constitute unlawful sex discrimination since there would be a disproportionate impact upon women. On June 26, this action was commenced under 42 U.S.C. §§ 1983 and 2000e-2; plaintiffs promptly moved for a preliminary injunction.

I ruled that although the layoffs would reduce the number of women on the force by 73.5% but only reduce the number of men by 23.9%, the firings were lawful because they were pursuant to a facially neutral seniority system and followed the "last hired, first fired" dictates of N.Y. Civil Service Law § 80 (McKinney 1973). *See* 401 F.Supp. 816 (1975). In denying the injunction and dismissing the complaint, I relied upon Third and Seventh Circuit decisions which had held that discharges based upon a bona fide seniority system were immune from attack by reason of Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), even though the seniority system perpetuated past discrimination.

The Court of Appeals reversed my determination and ruled that

> "If a female police officer can show that, except for her sex, she would have been hired early enough to accumulate sufficient seniority to withstand current layoffs, then her layoff violates section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1), since it is based on sexual discrimination."

531 F.2d 648, 654 (1976).

In advance of rehirings planned for July 7, 1976, plaintiffs moved for class certification, together with summary judgment and injunctive relief, for 54 class members. The defendants cross-moved for summary judgment raising the grounds of statute of limitations and laches. I ruled that the action was timely, relying upon the rationale of the Seventh Circuit's ruling in Evans v. United Air Lines, 534 F.2d 1247 (1976). I granted class certification and partial summary judgment and injunctive relief to 38 women who took examination No. 9081 given on October 25, 1969, the same date that the identical examination, No. 9080, was given to males, and who received sufficiently high test scores so that they would have been among the 125 police trainees who were hired in May 1970; each of the 38 had been under the required age of 21 at the time the 125 similarly situated males were appointed.

Since partial summary judgment had been entered pursuant to Rule 54(b), Fed.R.Civ.P., defendants filed a notice of appeal. On October 7, 1976, the Court of Appeals dismissed the appeal for failure to properly docket as required by that Court's "Civil Appeals Management Plan."

At the plaintiffs' request and without the opposition of defendants, I appointed a Special Master pursuant to Rule 53, Fed.R.Civ.P., to hear and report on the cases of the several hundred individual class members. To date, Special Master Renee Roberts has completed hearings in the cases of approximately 150 class members. She has issued five interim reports deciding the claims of 78 women. In advance of rehirings in March 1977, I confirmed the findings of fact and conclusions of law of all but 13 of the women[2] and enjoined rehirings from a seniority roster which did not reflect the adjusted seniority of 34 women found entitled to relief. Through the cooperation of all counsel and of the Special Master, all successful class members have been reinstated without the need for "bumping" any male officers in active service.

## II.

Plaintiffs' threshold argument in opposition to defendants' renewed summary judgment motion is that this Court is deprived of jurisdiction to consider any issues necessarily decided by the Court of Appeal's February 19, 1976 opinion, and that a motion should first be made in the Court of Appeals to recall their mandate. Last term, in *Standard Oil Co. of California* v. *United States*, 429 U.S. 17 (1976), the Court ruled that it is unnecessary to move to recall a mandate prior to a district court's consideration of a Rule 60(b), Fed.R.Civ.P., motion, and that such a motion to recall would actually be improper.

Alternatively, plaintiffs contend that the entry of partial summary judgment and the subsequent dismissal of the appeal renders the issues decided therein *res judicata*. While plaintiffs are correct in their assertion, the purpose of Rule 60(b) is to provide relief from judgments which have become final.

Rule 60(b) permits a court to relieve a party from a final judgment on the ground of "(1) mistake . . . . (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment." Such a motion must be made within a reasonable time and, if sought under subdivision one, made within one year. Plaintiffs urge that a reasonable time cannot exceed the time allowed for filing a notice of appeal.

*See* *Schildhaus* v. *Moe*, 335 F.2d 529 (2d Cir. 1964); Moore's *Federal Practice*, ¶ 60.27[1]. No such limitation appears in the rule. Whatever the merits of the suggested construction of the phrase "reasonable time" might be in other contexts, they do not apply here since this Court is exercising active and continuing jurisdiction over the suit, and particularly since no complete final judgment has been entered. In so ruling, I am not unmindful of prior teachings of this Circuit nor of the commentaries of learned professors. But each case is unique and procedural rules must be interpreted so as to achieve justice. The continued growth and viability of our common law demand no less.

Thus, reaching the question of whether there are appropriate grounds for relief from the judgment, I find that such relief is wholly proper. In fact, to do otherwise might create the anomalous situation in which the first 38 women reinstated pursuant to the grant of partial summary judgment would not be affected by *Evans* and *Teamsters*, but those reinstated thereafter in March 1977, would be. Because of the inequities created by a denial of the Rule 60(b) motion and the continuing nature of the injunctive decree, the judgment will be vacated.

## III.

The City defendants argue that the 300 day statute of limitations contained in 42 U.S.C. § 2000e-5(e) time-bars an action predicated upon the City's hiring practices. As previously indicated, my July 16, 1975 opinion relied upon the Court of Appeals decision in Evans for the proposition that failure to credit an individual with proper seniority is a separate and continuing violation of Title VII. In reversing the court below in Evans, the Supreme Court squarely rejected any such notions:

> "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.
>
> "Respondent emphasizes the fact that she has alleged a continuing violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists. She has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently than former employees who resigned or were discharged for a non-discriminatory reason. In short, the system is neutral in its operation." 45 U.S.L.W. 4566, 4567 (May 31, 1977)

I find that with respect to hiring practices, the discriminatory act occurs when a male police officer is hired instead of a female who meets all requirements for appointment and has a higher test score. Any class member who can demonstrate that such hirings occurred within the 300 days prior to June 25, 1975, may succeed. In its affidavits in support of summary judgment the City has averred that all class members were appointed to the force prior to the 300 day period.

The plaintiffs challenge this basic assertion only with respect to two class members, Francis Kripinski and Mary Ann Horneck, who were not hired until a point in time within the 300 day statute of limitations. The City defendants have submitted uncontradicted proof that Ms. Kripinski was offered appointment in April 1973, but withdrew from consideration at that time, and that Ms. Horneck was offered a position in January 1973, but she, too, declined. Apparently no hiring discrimination occurred with respect to these women within the period of limitations.

In his rebuttal affidavit of July 19, 1977, plaintiffs' counsel has asserted for the first time that a class member, Alice McCain, filed charges with the E.E.O.C. on September 11, 1973. A copy of these charges were handed up to me at oral argument and it appears that although they primarily challenge the hiring practices with regard to pregnancy, they could arguably be considered as a general attack on the Department's hiring policy. Plaintiffs contend that the filing of charges by a class member tolls the statute of limitations for all other members of the class and that the period of limitations should be measured from the date of the McCain charges.

In the typical case the named plaintiff files E.E.O.C. charges, commences a district court action, moves for class certification, and the entire class is given the benefit of the date of the named plaintiff's filing. See e.g., United States v. Georgia Power Co., 474 F.2d 906, 925 (5th Cir. 1973). The case before me, however, has been pending for two years and has been certified as a class for one year; at all times it has proceeded on the theory that the limitations period is to be measured from the date of the Acha and Egan charges. Fairness to both parties dictates that I not rule on the viability of the McCain charges now but permit the plaintiffs to amend their complaint to include the proper allegations; thereafter, the City defendants may raise the defenses of statute of limitations and laches, as they have indicated a desire to do.

Even assuming the timely filing of charges with the E.E.O.C., the City contends that the Teamsters decision forecloses most class members' Title VII claims.

In short, Teamsters held that a Title VII violation may not be premised upon discriminatory acts which occurred before the effective date of Title VII even though a present seniority system perpetuates the effect of pre-Title VII discrimination. Plaintiffs seek to avoid the application of Teamsters by arguing that it does not apply to the 1972 amendments which brought municipal employees within the ambit of the Act. While the Teamsters court did not decide that question, it did observe that the 1972 amendments to Title VII "in no way points to a different result." 45 U.S.L.W. 4506, 4513 n. 39. Moreover, in the later case of Hazelwood School District v. United States, 45 U.S.L.W. 4882 (June 27, 1977), the Court applied the Teamsters rationale to municipal employees without further discussion. Whatever may be said of the power of Congress to reach discrimination outside the purview of Title VII through the enforcement clause of the Fourteenth Amendment, it seems clear that in enacting the 1972 amendments Congress simply intended to grant municipal employees the identical Title VII benefits which private employees enjoy in addition to the 42 U.S.C. § 1983 rights which municipal employees had previously enjoyed. S. Rep. No. 92-415, pp. 10-11 (1971); H. R. Rep. No. 92-238, p. 17 (1971). Thus, with respect to Title VII relief, municipal employees are subject to all limitations of that Act.

An analysis of Teamsters must begin with Franks v. Bowman Transportation Co., 424 U.S. 747 (1976), wherein the Court held that section 703(h), the seniority system immunity provision, does not bar the remedy of a seniority revision to a date when an employee would have been hired but for the discrimination. Among the restrictions placed upon Franks, the Teamsters holding requires that the discrimination have taken place after the effective date of Title VII, which in the case of municipal employees is March 24, 1972. Pre-Act discrimination which is perpetuated by a neutral seniority system is immunized from Title VII attack by reason of section 703(h). 45 U.S.L.W. at 4512-14. To fall outside the immunity afforded to a bona fide seniority system, plaintiffs must show more than the system's failure to correct pre-Act discrimination.

Thus, the June 1975 layoffs pursuant to a facially neutral seniority system were immunized and cannot be the basis for a Title VII violation. Therefore, plaintiffs are effectively restored to their pre-summary judgment status and to succeed must establish a prima facie case of a Title VII violation which occurred after the effective date of the Act and within the period of the statute of limitations. Thereafter, any class member who was not hired until after March 24, 1972 and, but for her sex would have been hired earlier than her actual appointment date, is entitled to a seniority revision.

Apart from construing the requisites of a Title VII violation, Teamsters also limited the relief which may be afforded to an individual who does successfully establish post-Act discrimination. "[N]o person may be given retroactive seniority to a date earlier than the effective date of the Act." 45 U.S.L.W. at 4514. Thus, if the standards set forth above are met, a class member's seniority date may be revised to the date when she should have been appointed but no earlier than March 24, 1972.

## IV.

Heretofore, it had been unnecessary to consider plaintiffs' section 1983 claim because of the supposed applicability of Title VII. An alleged violation of that section must be evaluated separate and apart from any Title VII cause of action. Cf. Johnson v. Railway Express Agency, 421 U.S. 454 (1975).

The threshold defense of statute of limitations is again argued by the defendants. It is fairly well-settled that the three year statute of limitations provided for in N.Y. CPLR 214(2) governing "an action to recover upon a liability, penalty or forfeiture created or imposed by statute," controls. See Kaiser v. Cohn, 510 F.2d 282, 284-85 (2d Cir. 1974). Since this action was filed on June 26, 1975, any discriminatory acts which occurred within the three preceding years would be actionable. With respect to hiring practices, the discriminatory act for statute of limitations purposes, occurs when a male police officer is hired in the place of a qualified female with a higher test score. Thus, class members not hired until after June 1972, may attempt to prove a case. The plaintiffs may also attempt to prove that the layoffs themselves were violative of section 1983. However, they may not attempt to "bootstrap" a challenge to a pre-June 26, 1972 hiring practice simply by alleging that the effects of the earlier discrimination lingered until layoff.

There seems to be no dispute that the City of New York is not a "person" within the meaning of section 1983 whether money damages or injunction relief is sought. See Monroe v. Pape, 365 U.S. 167, 187 (1961); City of Kenosha v. Bruno, 412 U.S. 507, 511-13 (1973). Recovery in the form of monetary damages may be awarded against defendants Beame and Codd, as individuals, if and only if, a direct, personal involvement in a depravation of plaintiffs' rights is established. See Scheuer v. Rhodes, 416 U.S. 232, 238 (1974). However, neither section 1983 nor the Eleventh Amendment presents a bar to a suit for prospective injunctive relief against a municipal or state official acting in his official capacity. Ex parte Young, 209 U.S. 123 (1908). See Graham v. Richardson, 403 U.S. 365 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970). Yet, where there has been an intervening change in administration, plaintiffs must establish that the successor has or will continue the unlawful policy. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 622 (1974).[3]

To succeed under section 1983, plaintiffs must establish a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States . . . ." It is argued that gender-based discrimination by the N.Y.P.D. deprives plaintiffs of their rights secured by the Equal Protection Clause of the Fourteenth Amendment. The scholarly debate continues over the question whether sex discrimination should be subjected to strict judicial scrutiny, see Frontiero v. Richardson, 411 U.S. 677 (1973), a rationale basis standard, see Reed v. Reed, 404 U.S. 71 (1971), a third "middle-tier" between the two, c.f. Craig v. Boren, 45 U.S.L.W. 4057, 4063 (Dec. 20, 1976) (concurring opinion of Mr. Justice Powell), or a "sliding scale" requiring a delicate assessment of the rights and classifications in issue, Gunther, The Supreme Court 1971 - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).

In its most recent pronouncement,[4] the Supreme Court struck down a gender-based classification as violative of the Equal Protection Clause but could not agree on the standard to be used. Craig v. Boren, 45 U.S.L.W. 4057 (Dec. 20, 1976). Three members of the Court concurred that "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." 45 U.S.L.W. at 4059. Mr. Justice Powell concurred in the result but disagreed with the formulation of the majority; he would adhere to the rationale basis formulation with a recognition that gender-based classifications are subject "to a more critical examination . . . ." 45 U.S.L.W. 4063. In concurring, Mr. Justice Stevens expressed caution about "articulat[ing a standard] in all-encompassing terms[,]" and would analyze each case in terms of "whether the . . . justification put forward by the State is sufficient to make an otherwise offensive classification acceptable." 45 U.S.L.W. at 4064. Mr. Justice Stewart concluded that the classification would not pass muster under the rational-basis test, 45 U.S.L.W. at 4063. The Chief Justice and Mr. Justice Rehnquist also would apply a rational basis standard but would have upheld the classification at issue in Craig, 45 U.S.L.W. at 4065-66.

For the purposes of this case, it suffices to say that the sex-based distinctions must have more than simply a conceivable basis in reason but need not be justified by a compelling interest; there must be some substantial justification. Further refinement of this standard may await the development of proof at trial.

Plaintiffs suggest that the April 1973 merger of the patrolman and policewoman ranks is conclusive evidence of a lack of any justification for the distinction between men and women in the N.Y.P.D. While I agree that the merger may be strong evidence of a lack of justification, I am reluctant to foreclose defendants from introducing proof on the issue. To do so would inhibit employers from correcting past acts of sex discrimination for fear that such activity would immediately subject them to liability.

If the plaintiffs should succeed in establishing a lack of substantial justification for treating women in the N.Y.P.D. differently than men, their task is not complete. In order to establish a violation of the Equal Protection Clause enforceable under 42 U.S.C. § 1983, there must be proof that a discriminatory intent or purpose was a motivating factor in the official action. Washington v. Davis, 426 U.S. 229, 238-48 (1976); Village of Arlington

*Heights* v. *Metropolitan Housing Development*, 45 U.S.L.W. 4073, 4077 (Jan. 11, 1977). The discriminatory impact of a facially neutral policy is probative, but not determinative, of intent. *De jure* discrimination, in which a law or official policy expressly treats a class of persons in a less favorable manner, is, by its nature, intentional. *See Keyes* v. *School Dist. No. 1*, 413 U.S. 189,205 (1973); *Washington* v. *Davis*, 426 U.S. at 240. Thus, plaintiffs must show a discriminatory intent behind neutral policies which adversely affect women or show non-neutral, express discrimination.

V.

I have been advised by the parties that the City of New York plans to rehire a substantial number of police officers within the next thirty days. The plaintiffs seek an injunction against any rehirings which do not reflect the proper seniority of the women found entitled to relief in the Third, Fourth and Fifth Interim Reports of the Special Master, together with those women who were not found entitled to seniority revision but concerning whom plaintiffs believe the Special Master's findings were erroneous. The City defendants oppose all such relief and further seek a vacatur of the injunctions which followed the July 16, 1976 grant of summary judgment and the First and Second Interim Reports. Since the plaintiffs are effectively restored to pre-July 1976 status, the standard for a preliminary injunction would govern.

In this Circuit, a preliminary injunction will issue

> "only upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardship tipping decidedly *toward* the party requesting preliminary relief."

*Sonesta Int'l Hotels* v. *Wellington Associates*, 483 F.2d 247, 250 (2d Cir. 1973) (emphasis in original). There has been an indication in this Circuit that the "balance of the hardship" requirement of the second test must include a finding of irreparable harm. *Triebwasser & Katz* v. *American Tel. & Tel. Co.*, 535 F.2d 1356, 1359 (2d Cir. 1976).

I find that even upon a generous view of the "balance of the hardships" test plaintiffs cannot obtain the requested injunction. The number of police officer slots open to rehirees is fixed by manpower and budgetary limitations. An injunction revising a female former police officer's seniority will necessarily mean that another former police officer, male or female, who actually entered service on an earlier date will not be hired;

thus, the likelihood of irreparable injury or the balance of the hardships is equal to both the alleged discriminatees and non-discriminatees. Moreover, the office of a preliminary injunction is to maintain the status quo, SCM Corp. v. Xerox Corp., 507 F.2d 358. 361 (2d Cir. 1974), and an injunction granting affirmative relief will only issue if a clear right to that relief is shown. Blaich v. National Football League, 212 F.Supp. 319, 320 (S.D.N.Y. 1962). The plaintiffs' request for an injunction is, therefore, denied.

For these same reasons, I will not vacate the injunctions heretofore granted. The class members covered by those injunctions have already established to the satisfaction of the Special Master and of this Court that but for certain policies of the N.Y.P.D. they would have been hired at an earlier date. Pending a determination of whether those policies were unlawful and whether their cases are timely, it is entirely proper to continue the injunction since it will maintain what is now the status quo. By freezing events at the present status quo, disruption within the N.Y.P.D. will be minimized. I will, however, direct that the City defendants advise all new rehirees, in advance of rehiring, that there is a very real possibility that the seniority roster may be revised in such a manner as will result in their layoff.

A prompt resolution of the factual issues raised in this opinion is in the best interests of all the parties. The requirements of the Speedy Trial Act, 18 U.S.C. § 3161 et seq., governing the disposition of criminal cases, prevents me from restructuring my trial calender. I am, therefore, directing Special Master Roberts, who has already presided over 150 hearings in this case, to hear and report on the factual questions presented herein. Commencement of the hearing must first await a resolution of the McCain issue.

The City defendants' motion to vacate partial summary judgment heretofore entered for some plaintiffs, is granted but the injunctions entered on behalf of these plaintiffs will stand as a preliminary injunction. The defendants' cross-motion for summary judgment is denied without prejudice to its renewal, along with a motion addressed to the McCain amendments.

The plaintiffs' application for further preliminary injunctions is denied.

The factual determinations of the Special Master in the Third, Fourth and Fifth Interim Reports are confirmed but the cases of class members found entitled to revised seniority are remanded for new findings and conclusions consistent with this opinion.

Plaintiffs' motion pursuant to Rule 52(b), along with all other questions of Title VII relief raised in its May 10, 1977 motion, are stayed pending trial.

All other relief requested by the parties is denied.

SO ORDERED.

Kevin Thomas Duffy
U. S. D. J.

Dated: New York, New York
July 28, 1977.

## FOOTNOTES

1/ Since the June 1975 layoffs of female police officers were held to be a violation of Title VII, the earlier hiring practices of the Police Department have never been subjected to the fact-finding processes. Thus, the summary of facts is based upon the allegations of the complaint, the affidavits which have been submitted in support of the various motions in this case, and the exhibits thereto. Although some of the facts are either undisputed or necessarily decided by my affirmance of the First and Second Interim Reports of the Special Master, much remains in dispute.

2/ In an oral opinion of February 25, 1977, I ruled that "two elements . . . must coalesce in point of time: first, an individual must have had the desire and intent to become a police officer; and, second, an individual must have possessed all of the requirements for appointment." I, therefore, remanded the cases of those women who lacked a high school diploma or New York driver's license as of the retroactive seniority date awarded to them by the Special Master. In the case of one woman who lacked the mandatory residency requirement, I concluded that since residency can be changed at any moment by act of will, it was essentially a factual question whether, considering all the facts and circumstances, the individual would have changed her residency. My ruling on the diploma, license, and residency is now the subject of a Rule 52(b) motion which will be stayed pending hearing. When and if the Rule 52(b) motion is reached, I will also consider plaintiffs' argument that the cases of Vanina Maffia and Carol Kane (Third Interim Report at 3; Fourth Interim Report at 11), who received a New Jersey but not a New York license, should be judged by the "act of will" analysis applied to the residency requirement since New York requires the holder of a New Jersey driver's license to pass a written test but not a road test.

FOOTNOTES continued

3/ While Edelman v. Jordan, 415 U.S. 651, 661-67 (1974) forecloses any money judgment payable out of a state treasury, regardless of whether it is an adjunct of equitable relief, the holding is not directly applicable to municipalities since they are not protected by the Eleventh Amendment. Recently, the Court of Appeals for this Circuit, relying upon Monroe v. Pape, 365 U.S. 167 (1961), ruled that back pay awards may not be obtained under section 1983 against municipal officials in their official capacity. Monell v. Department of Social Services, 532 F.2d 259 (2d Cir. 1976), cert. granted, 45 U.S.L.W. 3508 (Jan. 25, 1977); if the Supreme Court should rule to the contrary, the question of back pay under section 1983 may be reopened.

4/ The later case of Califano v. Goldfarb, 45 U.S.L.W. 4237 (Mar. 2, 1977), decided under equal protection concepts as incorporated into the Fifth Amendment, does not shed additional light on the problem.

# Plaintiffs' Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------------------x

BERALDINE L. ACHA and ARLENE M. EGAN,
each individually and on behalf of all
others similarly situated,

Plaintiffs,

-against-

ABRAHAM D. BEAME, individually and in
his capacity as Mayor of the City of
New York, MICHAEL J. CODD, individually
and in his capacity as Police Commissioner
of the New York City Police Department,
and THE CITY OF NEW YORK, as a public
employer,

Defendants.

-----------------------------------------------x

NOTICE OF APPEAL

75 Civ. 3128
(KTD)

77 AUG 2 P2:56

NOTICE is hereby given that plaintiffs, BERALDINE L. ACHA and ARLENE M. EGAN, and all others similarly situated, members of the class of plaintiffs in the above-entitled action, hereby appeal to the United States Court of Appeals for the Second Circuit from an order entered herein in the office of the Clerk of the United States District Court for the Southern District of New York on the 28th day of July, 1977, to the extent that said order:

1. granted the motion of the defendants to vacate the partial summary judgment entered herein on August 4, 1976, in favor of 38 members of the class of plaintiffs;

2. denied the motion of plaintiffs for an injunction against any rehirings which do not reflect the revised

seniority dates, to which certain named members of the class of plaintiffs were found to be entitled in the Third, Fourth, and Fifth Interim Reports of the Special Master, as follows:

| Plaintiff | Revised Seniority Date |
|---|---|
| Vanina Maffia | April 11, 1973 |
| Patricia Cardone | June 23, 1967 |
| Martina Guidone | November 7, 1967 |
| Jane Waye | January 29, 1973 |
| Carol Kane | January 29, 1973 |
| Carol Conry | March 1, 1967 |
| Kathleen Jappe | November 7, 1966 |
| Mary Jane Stagno | June 23, 1967 |
| Maria Finamore | October 29, 1965 |
| Nancy Howells | January 29, 1973 |

3. denied the motion of the plaintiffs for an order pursuant to Rules 6(d) and 53(e)(2) of the Federal Rules of Civil Procedure sustaining the objections of the plaintiffs filed on July 6, 1977 and July 13, 1977 to the findings in the Third, Fourth and Fifth Interim Reports of the Special Master that certain named members of the class of plaintiffs have not established by a preponderance of the evidence their entitlement to revised seniority dates;

4. denied the motion of the plaintiffs for an order pursuant to Rule 6(d) and 53(e)(2) of the Federal Rules of Civil Procedure that the members of the class of plaintiffs named below are entitled to revised seniority dates and to injunctive

relief against any hirings which do not reflect said revised seniority dates, as indicated below:

| Plaintiff | Revised Seniority Date |
|---|---|
| Celia Roth | August 1, 1966 |
| Mary Ann Paganucci | September 29, 1965 |
| Anna Maria Martuciello | June 7, 1968 |
| Beverly Malmbeck | July 15, 1964 |
| Mary Ann Horneck | July 15, 1964 |
| Sandra Gonzalez | March 1, 1967 |
| Carol Kaminsky | November 7, 1966 |
| Vanina F. Maffia | March 14, 1969 |
| Jane Waye | June 30, 1969 |
| Carol Kane | March 1, 1967 |
| Nancy Howells | June 26, 1963 |
| Patricia McDermott | October 29, 1965 |
| Maureen Burke | July 15, 1964 |
| Kathleen P. Egan | July 15, 1964 |
| Carol S. Kranciek | August 30, 1968 |

Dated: New York, New York
August 2, 1977

MURRAY A. GORDON, P. C.

By:
MURRAY A. GORDON
Attorneys for Plaintiffs
666 Third Avenue
New York, New York 10017
212-661-7900

TO: W. BERNARD RICHLAND, ESQ.
Corporation Counsel
Attorneys for Defendants
Municipal Building
New York, New York 10007

Order of Stay pending appeal by Hon.
Kevin T. Duffy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
AUG 4 1977
S.D. OF N.Y.

---------------------------------------x

GERALDINE L. ACHA,
ARLENE M. EGAN, each individually
and on behalf of all others
similarly situated,

- against -

ABRAHAM D. BEAME, individually
and in his capacity as Mayor of the
City of New York,
MICHAEL J. CODD, individaully and
in capacity as Police Commissioner
of The City of New York, as a public
employer,

---------------------------------------:

ORDER

75 Civil 3128

AUG 4 1977

KEVIN THOMAS DUFFY, D. J.

In view of the fact that the defendants entend to rehire people for the Police Force and these are eleven women who would otherwise be eligible to be rehired, a stay will issue as to those eleven positions until such time as the matter may be heard and decided by the Court of Appeals of this circuit.

SO ORDERED.

Kevin Thomas Duffy
U.S.D.J.

Dated: New York, New York

August 5, 1977

Service of ~~three~~ Two (2) copies of the within VOLUME II OF JOINT APPENDIX

is admitted this 1ST day of SEPT 1977

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CORPORATION COUNSEL
CITY OF NEW YORK

THREE COPIES OF THE WITHIN PAPER
HAVE THIS DAY BEEN RECEIVED AT THE
OFFICE OF THE CORPORATION COUNSEL

~~[illegible]~~
Sept 1, 1977

CORPORATION COUNSEL